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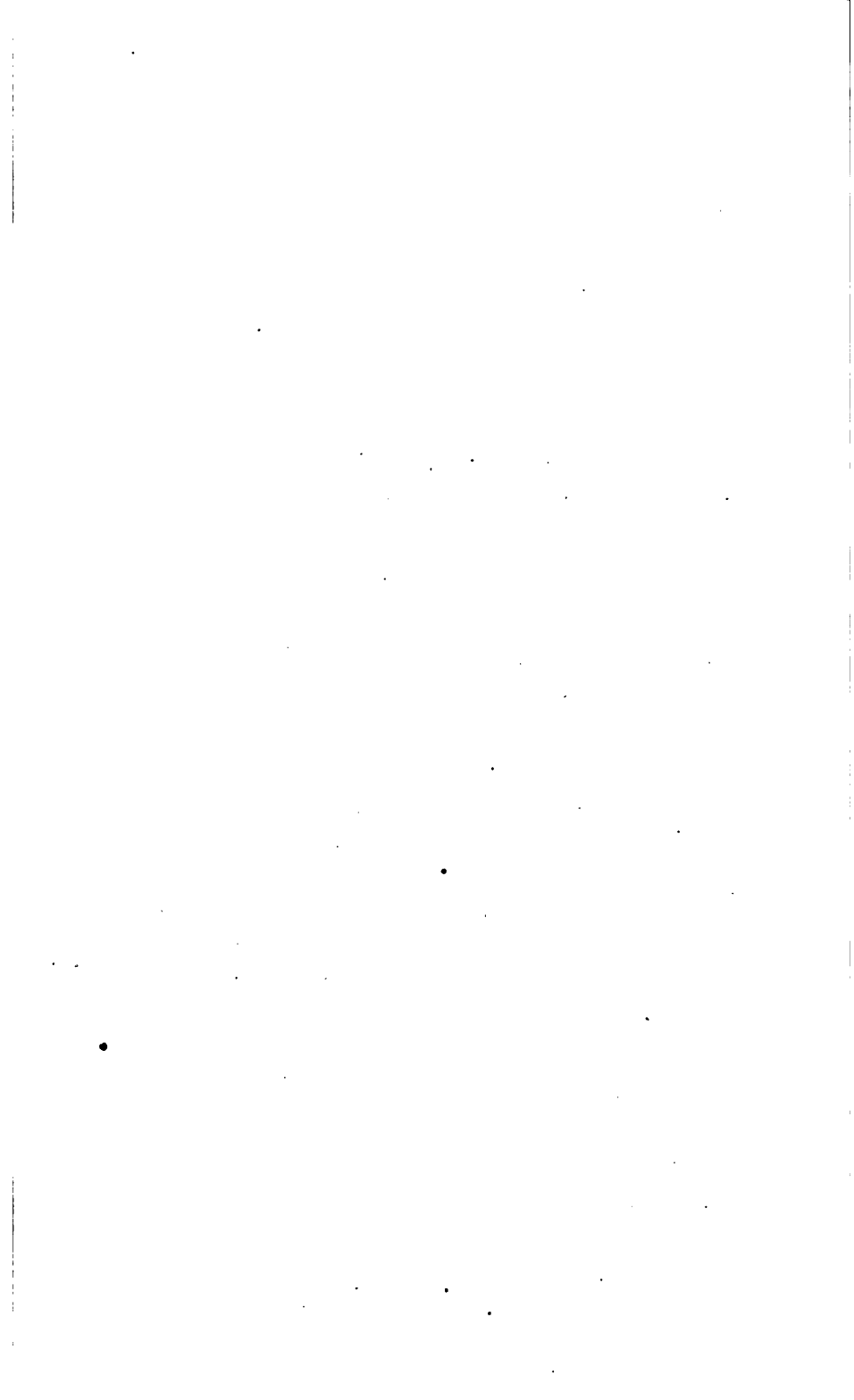
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**ART. I.—THE *ESSAYS AND REVIEWS* CONSIDERED
IN RELATION TO THE LEGAL LIABILITIES
OF THE WRITERS.**

1. *Essays and Reviews*. London : Longman, 1861.
2. *Specific Evidence of Unsoundness in the volume entitled Essays and Reviews*. By R. N. JELF, D.D. Oxford : J. H. Parker. London : Rivington, 1861.

THE volume entitled "*Essays and Reviews*," being of a theological description, would not have called for discussion in our pages if it were not connected with grave legal questions threatened to be raised. Yet no apology need be offered to the readers of the *Law Magazine* even if we entered in detail upon the consideration of the topics of which the book treats ; for the lawyer is not only bound to understand the legal rights and remedies connected with tithes, rates, pews, and with the legal relation of bishops, rectors, vicars, and curates, but it devolves, after all, upon the lawyer to decide what are orthodoxy, heresy, and schism. Prelates and priests may denounce each other in convocation or in deputation ; clerkly persons, in ministering at the altar, or mouthing at Exeter Hall and the social tea-table, may depose positively as to what is true and what is false doc-

trine—may repel, embrace, receive, or excommunicate; but when the time comes to test the value of their opinions, to discover who is a "sound" churchman, or who a teacher or holder of strange and damnable doctrine, resort must be had to the lawyer only.

Happily, from habit and reason, men of the legal profession can entertain theological questions with great composure; and if they have their personal opinions and private creeds combated, still their professional education enables them to submit to the misfortune without exhibiting great excess of indignation, and without giving utterance to grievous complaint of the wickedness and impiety of the rest of mankind. If a Ditcher want to deprive a Denison of his preferment, and inflict severe penalties on his erring brother, he runs to his attorney, who takes him to his proctor, who refers to his counsel, who introduces him to the judge, who settles the dispute. If a confederacy of devout parsons who know that they, and they alone, hold the truth, desire to avenge them of the vicar of Brading, after taking sweet counsel of themselves they must proceed to take dear counsel of their lawyers. The lawyer is, indeed, the arbiter of religious truth in England, and, be the task tasteful or nauseous, he must acquaint himself with the theological and ecclesiastical system about which men delight to litigate. Moreover, he must extend his investigation to divers dissenting communities, preparing himself for many questions connected with chapels, congregations, and ministers, which will spring forth occasionally. Nor is it an easy part of his professional duties, whether he practise in a village, or before the highest tribunal in the country, to conduct such suits. Still less easy is the task of exerting his influence in mollifying party warfare, and rendering placable those Christian volunteers of the church-militant, who show their pugnacity and zeal, by hunting out and stabbing co-religionists supposed to have some flaw in their creed. No client is naturally so bitter and blind, so full of personal vindictiveness or party unscrupulousness, as the parochial or diocesan Sauls, who, luckily for the cause of liberty in England, are brought under the govern-

ment of the law, and subject to the judgment of jurists ere they hale men every where to prison.

We need not insist further upon this, nor excuse ourselves to our legal readers for devoting, in this article, our attention to matter with which the religious world also is occupying itself. There is now notoriously an attempt being made in the Church of England to cast out from her communion those learned men who have published the "*Essays and Reviews*." Some hold it is a noble effort to church purification, while others think it is a common-place attempt at personal persecution. We purpose to examine the legal position of those six clerical writers, who, with one layman, are the authors of the work before us. The one layman is a barrister. If, however, he be also a heretic, he is subject, we apprehend, to excommunication under the fifth canon. Should this awful consequence ensue, and Mr. Goodwin be driven to draw wills, peruse abstracts, and advise on titles, under the sentence of excommunication, it might or might not have a material influence over his professional career, for it is impossible to tell what would be the position, legal or social, of an excommunicated conveyancer; and indeed, if Mr. Goodwin has published false and damnable doctrine,¹ we will not, lawyer though he be, say one word to deprecate the punishment due to his crime; but his crime and his future fate do not concern the object we have here particularly in view, which is to examine rather the legal position of the clerical contributors to the *Essays and Reviews*.

"It will readily be understood that the authors of the ensuing essays are responsible for their respective articles only. They

¹ We may here say that Mr. Goodwin's article on the Mosaic cosmogony sets forth, first, that Moses, or whoever compiled the Book of Genesis, says that "the world was made in six days;" second, that Dr. Buckland, Hugh Miller, Archdeacon Pratt, and others, really affirm that it was *not* made in six days, but that Moses was quite right in saying that it was. He further makes those orthodox writers contradict themselves, each other, and Moses. He also exposes the ordinary uncandid attempt at reconciling the results of modern science with the Mosaic account of creation. It is evident, therefore, that Mr. Goodwin is a heretic of the worst order; for he not only denies that the world was made in six days, but he shows that respectable men of science have in vain been struggling to pass as orthodox. He has thus proved the number of the enemies of the church to be larger than generally supposed.

have written in entire independence of each other, and without concert or comparison." This is the preliminary advertisement to the "Essays and Reviews," and it contains two propositions. One is, that the "authors are responsible for their respective articles only." The other is, that "the essays have been written without concert or comparison." In their intemperance and wrath, certain dignitaries have discourteously denied the fact of non-concert, and protested that there should be a common responsibility. But we may venture to affirm that no tolerably candid person in his cooler moments, and out of Convocation, would attempt, or even wish to attempt, to make the writers mutually responsible for each other's doctrine. It would indeed be absurd to attempt to make any one writer *legally* responsible for the expressions of another. Even in a quarterly periodical, where the articles are anonymous, no one dares to impute to the author of one article responsibility for the doctrine inculcated by any other. Would the Right Rev. the Bishop, who may, for aught we know to the contrary, have written the article in the January Number of the *Quarterly Review*, on "Essays and Reviews," admit that he might fairly be held to answer for all the views, doctrines, and statements of which that periodical is made the vehicle? We will assume, therefore, that the attempt made to cajole or bully some of the essayists into repudiating the opinions of the others, was an effort worthy indeed of sectarian controversialists, but not in itself laudable or even creditable; and that the seven authors are and can legally or morally be held responsible for their respective articles only; and we shall endeavour to examine for what they are responsible, and how that responsibility is practically to be made to attach.

We may judge from the uplifted voices of the united and great men of the church, who have of late been thanking God that they are not as the seven essayists, and to some extent from the sycophantist echoing of the episcopal denunciations by the inferior clergy, that this volume contains many doctrines and statements not generally believed to be in accordance with the

views of most of the present parties in the church of England; and though many will recognise the opinions as either common in the society of educated men, or at least not opposed to them, yet they are rarely heard expounded from the pulpit, or suspected to be entertained by the clergy. This, however, does not make them legally heterodox; and the ideas, be it remembered, which are singular in one generation, become the popular creed, or party commonplace, of the next. In every church in the world its conservative sections habitually vociferate for the excommunication of those who, by intellectual efforts, alter the ancient landmarks of opinion, or enlarge the field of tolerated doctrines. It must be established, not by popular prejudices, but on legal and substantial grounds, that the party now agitating for persecution can successfully convict the six clergymen. The questions then which concern us are—1, as to the doctrines contained in “*Essays and Reviews*” being legally heterodox, and—2, as to the means by which the Bishops (panting, as they declare they are, to purify the church by a little wholesome persecution) can attack the men who have dared to publish the book.

The question of the legal responsibility of those whose theological views differ from the opinions commonly held, or at least commonly expressed, has in fact been considered to some extent by one of the essayists—Mr. Wilson—in his article on the national church, and we will therefore first draw attention to his views on the subject. “It may be worth while,” he says, “to consider how far a liberty of opinion is conceded by our existing laws, civil and ecclesiastical. Along with great openings for freedom, it will be found there are some restraints, or appearances of restraints, which require to be removed.

“As far as opinion privately entertained is concerned, the liberty of the English clergyman appears already to be complete; for no ecclesiastical person can be obliged to answer interrogations as to his opinions, nor be troubled for that which he has not actually expressed, nor be made responsible for inferences which other people may draw from his expressions.” [To this

passage the following note is appended—"The oath *ex officio* in the ecclesiastical law, is defined to be an oath whereby any person may be obliged to make any presentment of any crime or offence, or to confess or accuse himself or herself of any criminal matter or thing, whereby he or she may be liable to any censure, penalty, or punishment whatsoever, 4 Jac. : 'The lords of the council at Whitehall demanded of Popham and Coke, chief-justices, upon motion made by the Commons in Parliament, in what cases the ordinary may examine any person *ex officio* upon oath.' They answered—1. That the ordinary cannot constrain any man, ecclesiastical or temporal, to swear generally to answer such interrogations as shall be administered to him, &c. That no man, ecclesiastical or temporal, shall be examined upon the secret thoughts of his heart, or of his secret opinion ; but something ought to be objected against him which he hath spoken or done. Thus, 13 Jac., Dighton and Holt were committed by the high commissioners, because, being convented for slanderous words against the Book of Common Prayer and the government of the Church, and being tendered the oath to be examined, they refused. The case being brought before the King's Bench on *habeas corpus*, Coke C. J. gave the determination of the Court, 'That they ought to be delivered, because their examination is made to cause them to accuse themselves of a breach of a penal law, which is against law ; for they ought to proceed against them by witnesses, and not enforce them to take an oath to accuse themselves.' Then, by 13 Car. II., c. 12, it was enacted, 'That it shall not be lawful for any person, exercising ecclesiastical jurisdiction, to tender or administer to any person whatsoever the oath usually called the oath *ex officio*, or any other oath, whereby such person, to whom the same is tendered or administered, may be charged or compelled to confess or accuse, or to purge himself or herself, of any criminal matter or thing,' &c.—Burn's *Eccl. Law*, iii. 14, 15, ed. Phillimore."]

"Still," continues Mr. Wilson, "though there may be no power of inquisition into the private opinions either of ministers

or people in the Church of England; there may be some interference in the expression of them; and a great restraint is supposed to be imposed upon the clergy by reason of their subscription to the Thirty-nine Articles. Yet it is more difficult than might be expected, to define what is the extent of the legal obligation of those who sign them; *and in this case the strictly legal obligation is the measure of the moral one.* Subscription may be thought even to be inoperative upon the conscience by reason of its vagueness; for the act of subscription is enjoined, but its effect or meaning nowhere plainly laid down; and it does not seem to amount to more than an acceptance of the Articles of the Church, as the formal law to which the subscriber is, in some sense, subject. What that subjection amounts to, must be gathered elsewhere; for it does not appear on the face of the subscription itself."

The fifth and thirty-sixth canons are those which contain the *ecclesiastical law* on this head. Canon five is entitled "*Impugners of the Articles of Religion established in the Church of England censured.*" It provides, "That whosoever shall hereafter affirm that any of the Nine-and-thirty Articles agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the convocation holden at London in the year of our Lord God 1562, for avoiding diversities of opinion, and for the establishing of consent touching true religion, are in any part superstitious or erroneous, or such as he may not with a good conscience subscribe unto; let him be excommunicated *ipso facto*, and not restored but only by the archbishop, after his repentance and public revocation of such his wicked errors." This canon, it must be observed, refers to laymen as well as the clergy. "Whoever" impugns the Thirty-nine Articles is to be excommunicated; and if, indeed, it be a wicked thing to impugn any of these Articles, how much more criminal are they in authority, who, neglecting their duty in this behalf, take no steps to purify the church, by punishing the multitude of malignants who we fear still mingle in society, instead of being rejected and branded as excommunicants. We could mention whole firms of "im-

pugning" attorneys, and staircases full of "impugning" counsel, who ought, if the church did its duty, to be excommunicated, nor received again till they had walked barefoot from Temple Bar to Westminster, confessing their iniquities.

Upon this fifth canon Mr. Wilson observes that we must determine what is the proper definition of the word "impugning." The canon states it to be the affirming that any of the Thirty-nine Articles are in any part "superstitious or erroneous." But, says he, "An Article may be very inexpedient, or become so; may be unintelligible, or not easily intelligible to ordinary people; it may be controversial, and such as to provoke controversy, and keep it alive when otherwise it would subside; it may revive unnecessarily the remembrance of dead controversies, all or any of these, without being 'erroneous;' and, though not 'superstitious,' some expressions may appear so—such as those which seem to impute an occult operation to the sacraments. The fifth canon does not touch the affirming any of these things, and more especially that the Articles present truths disproportionally and relatively to ideas not now current."

There is, however, yet the thirty-sixth canon, which presents like difficulties to the fifth, but does not affect those who have accepted office in good faith, but those only who purpose to enter office, and who must, as a condition precedent, subscribe. It therefore does not directly belong to the question of the legal liability of the six clerical essayists; but it is indirectly a part of the question, and it is claimed on their behalf, that the theological opinions which they profess would not be incompatible with their right to subscribe according to the provision of this canon. The thirty-sixth canon is entitled, "*Subscription required of such as are to be made Ministers*," and it is thus worded:—"No person shall hereafter be received into the ministry, nor either by institution or collation admitted to any ecclesiastical living, nor suffered to preach, to catechize, or to be a lecturer or reader of divinity, in either university, or in any cathedral or collegiate church, city, or market-town, parish church, chapel, or in any other place within this realm,

except he be licensed either by the archbishop or by the bishop of the diocese where he is to be placed, under their hands and seals, or by one of the two universities under their seal likewise; and except he shall first subscribe to these three articles following, in such manner and sort as we have here appointed.

„ 1. That the king's majesty, under God, is the only supreme governor of this realm, and of all other his highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes, as temporal: and that no foreign prince, person, prelate, state, or potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within his majesty's said realms, dominions, and countries.

“ 2. That the Book of Common Prayer, and the ordering of bishops, priests, and deacons, *containeth in it nothing contrary to the word of God*, and that it may lawfully so be used; and that he himself will use the form in the said book prescribed, in public prayer, and administration of the sacraments, and none other.

“ 3. That he *alloweth* the Book of Articles of Religion, agreed upon by the archbishops and bishops of both provinces, and the whole clergy in the convocation holden at London in the year of our Lord God one thousand five hundred sixty and two; and that he *acknowledgeth* all and every the Articles therein contained, being in number nine-and-thirty, besides the ratification, *to be agreeable to the word of God*.

„ To these three Articles whosoever will subscribe he shall, for the avoiding of all ambiguities, subscribe in this order and form of words, setting down both his Christian and surname, viz., *I N. N. do willingly and ex animo subscribe to these three Articles above mentioned, and to all things that are contained in them*. And if any bishop shall ordain, admit, or license any, as is aforesaid, except he first have subscribed in manner and form as here we have appointed, he shall be suspended from giving of orders and licences to preach for the space of twelve months. But, if either of the universities shall offend therein, we leave them to the danger of the law, and his majesty's censure.”

On this canon Mr. Wilson comments, observing that its two clauses are explanatory, to some extent, of the meaning of ministerial subscription, "That he *alloweth* the Book of Articles," &c. ; and "that he acknowledgeth the same to be agreeable to the word of God." "We 'allow' many things," says he, "which we do not think wise or practically useful ; as the less of two evils ; or an evil which cannot be remedied, or of which the remedy is not attainable, or is uncertain in its operation, or is not in our power, or concerning which there is much difference of opinion ; or, where the initiation of any change does not belong to ourselves, nor the responsibility belong to ourselves, either of the things as they are, or of searching for something better. Many acquiesce in, submit to, 'allow' a law, as it operates upon themselves, which they would be horror-struck to have enacted ; yet they would gladly and in conscience 'allow' and submit to it as part of a constitution under which they live, against which they would never think of rebelling, which they would on no account undermine, for the many blessings of which they are fully grateful ; they would be silent and patient, rather than join, even in appearance, the disturbers and breakers of its laws. Secondly, he 'acknowledgeth' the same to be agreeable to the word of God. Some distinctions may be founded upon the word 'acknowledge.' He does not maintain nor regard it as self-evident, nor originate it as his own feeling, spontaneous opinion, or conviction ; but when it is suggested to him, put in a certain shape ; when the intention of the framers is borne in mind, their probable purpose and design explained, together with the difficulties which surrounded them, he is not prepared to contradict, and he acknowledges. There is a great deal to be said which had not at first occurred to him. Many other better and wiser men than himself have acknowledged the same thing : why should he be obstinate ? Besides, he is young, and has plenty of time to reconsider it ; or he is old, and continues to submit out of habit, and it would be too absurd, at his time of life, to be setting up as a church reformer. But, after all, the important phrase is, that the Articles are 'agreeable to the word of God.' This

cannot mean that the Articles are precisely co-extensive with the Bible, much less of equal authority with it as a whole. Neither separately nor altogether do they embody all which is said in it; and inferences which they draw from it are only good relatively, and *secundum quid* and *quatenus concordant*. If their terms are biblical terms, they must be presumed to have the same sense in the Articles which they have in the Scripture; and, if they are not all scriptural ones, they undertake in the pivot Article not to contradict the Scripture. The Articles do not make any assumption of being interpretations of Scripture, or developments of it. The greater must include the less; and the Scripture is the greater.

“On the other hand, there may be some things in the Articles, which could not be contained, or have not been contained in the Scripture; such as propositions or clauses concerning historical facts more recent than the Scripture itself: for instance, that there never has been any doubt in the church concerning the books of the New Testament. For, without including such doubts as a fool might have, or a very conceited person; without carrying doubts, founded upon mere criticism and internal evidence only, to such an extent as a Baur, or even an Ewald—there was a time when certain books existed, and certain others were not as yet written; for example, the Epistles of St. Paul were anterior, probably to all of the Gospels, certainly to that of St. John; and of course the church could not receive without doubt books not as yet composed. But as the canon grew, book after book emerging into existence and general reception, there were doubts as to some of them, for a longer or shorter period; either concerning their authorship or their authority. The framers of the Articles were not deficient in learning, and could not have been ignorant of the passages in Eusebius, where the different books current in Christendom in his time are classified as genuine or acknowledged doubtful and spurious. If there be an erroneousness in such a statement, as that there never was any doubt in the church concerning the Book of the Revelation; the Epistle to the Hebrews, or the second of St. Peter, it cannot

be an erroneousness in the sense of the fifth canon, nor can it be at variance with the word of God according to the thirty-sixth. Such things in the Articles as are beside the Scripture are not in the contemplation of the canons. Much less can historical questions, not even hinted at in the Articles, be excluded from free discussion; such as concern the dates and composition of the several books and compilation of the Pentateuch, the introduction of Daniel into the Jewish canon, and the like, with some books of the New Testament,—the date and authorship, for instance, of the fourth Gospel.

"Many of those who would themselves wish the Christian theology to run on in its old forms of expression, nevertheless deal with the opinions of others, which they may think objectionable, fairly as opinions. There will always, on the other hand, be a few whose favourite mode of warfare it will be to endeavour to gain a victory over some particular person who may hold opinions they dislike, by entangling him in the formularies. Nevertheless, our formularies do not lend themselves very easily to this kind of warfare, *contra retiarium baculo*."¹

Such is Mr. Wilson's apology for "allowing" and "acknowledging" Articles which, whatever their advantages, have at all times caused embarrassment to conscientious men who exercise honestly their thinking faculties, and which probably now induce the practice of no little casuistry. They certainly cause with many an unhealthy resolution, not to look too closely into matters which are doubtful, but rather to do as others do, and undertake a general responsibility only, in common with the rest of the world.

The following passage, affording, as it does, additional examples of the point of view from which Mr. Wilson thinks the Articles may be regarded, ought here, in fairness to himself, to be presented to the reader:—

"It may be easy," says he, "to urge invidiously, with respect to the impediments now existing to undertaking office in the national church, that there are other sects which persons dissa-

¹ Essays and Reviews, Essay 3.

tified with her formularies may join, and where they may find scope for their activity, with little intellectual bondage. Nothing can be said here, whether or not there might be, elsewhere, bondage at least as galling, of a similar or another kind. But the service of the national church may well be regarded in a different light from the service of a sect. It is as properly an organ of the national life as a magistracy or a legislative estate. To set barriers before the entrance upon its functions, by limitations not absolutely required by public policy, is to infringe upon the birthright of the citizen; and to lay down, as an alternative to striving for more liberty of thought and expression within the church of the nation, that those who are dissatisfied may sever themselves and join a sect, would be paralleled by declaring to political reformers, that they are welcome to expatriate themselves if they desire any change in the existing forms of the constitution. The suggestion of the alternative is an insult; if it could be enforced it would be a grievous wrong."

The meshes of these provisions, says Mr. Wilson, are too open for modern refinement; for, not to repeat what he has already said concerning "allow" and "acknowledge," let the Articles be taken according to an obvious classification.

"Forms of expression, partly derived from modern modes of thought on metaphysical subjects, partly suggested by a better acquaintance than heretofore with the unsettled state of Christian opinion in the immediately post-apostolic age, may be adopted with respect to the doctrines enunciated in the five first Articles, without directly contradicting, impugning, or refusing assent to them, but passing by the side of them."

Then, with respect to what Mr. Wilson calls the pivot Articles, concerning the rule of faith and the sufficiency of Scripture, he says they are "happily found to make no effectual provision for an absolute uniformity, whenever the freedom of interpretation of Scripture is admitted." Again, the Articles which have a Lutheran and Calvinistic sound are found to be equally open, because they are, for the most part, founded on the very words of Scripture; and these, while worthy of unfeigned assent, are

capable of different interpretations. Indeed, "the Calvinistic and Arminian views have been declared by a kind of authority to be both of them tenable under the seventeenth Article; and, if the scriptural terms of 'election' and 'predestination' may be interpreted in an anti-Calvinistic sense, 'faith,' in the tenth and following articles, need not be understood in the Lutheran. These are instances of legitimate affixing different significations to terms in the Articles, by reason of different interpretations of Scriptural passages."

(Leaving for the present the general argument, which seems more directed to what are called conscientious scruples, though in truth these ought not to be other than the legal difficulties of the case present, we will advert to the statutory enactments which are directed against clergymen who hold strange doctrines.

The 13 Elizabeth, c. 12, forbids, under certain penalties, the advisedly and directly contradicting any of the Articles by ecclesiastics, and requires subscription with declaration of assent from beneficed persons. The section which expresses this we here subjoin :—

Section 2 enacts—"That if any person ecclesiastical, or who shall have ecclesiastical living, shall advisedly maintain or affirm any doctrine *directly contrary or repugnant to any of the said Articles*, and being convented before the Bishop of the diocese in ordinary, or before the Queen's Highness' Commissioners in causes ecclesiastical, shall persist therein, or not revoke his error, or, after such revocation, eftsoon affirm such untrue doctrine, such maintaining or affirming and 'persisting,' or such eftsoon affirming, shall be just cause to deprive such person of his ecclesiastical promotion; and it shall be lawful to the Bishop of the diocese, or the Ordinary, or the said Commissioners, to deprive such person so persisting, or lawfully convicted of such eftsoon's affirming; and upon such second deprivation pronounced, he shall be indeed deprived."

The 3rd section provides that no person shall be admitted to cure of souls without having subscribed, and publicly read, the

Thirty-nine Articles in St. Paul's Church, with a declaration "of unfeigned assent" thereunto.

It is said in Burn's *Ecclesiastical Law* (Ed. Phillimore, 1842), that up to that date the case of the *Bishop of London v. Stone* (in the first volume of Dr. Haggard's Reports of Lord Stowell's decisions in the Consistory Court), was the only case reported where proceedings have been instituted against a clergyman under the above statute. In this case the offence was laid as "advisedly maintaining or affirming doctrines directly contrary to the Articles of Religion;" and Sir William Scott's judgment is worth perusing, not only as being an authority on this statute, but for the strong light in which he places the disadvantages which would arise from the preaching of diversity of doctrine, and for the manner in which he treats the whole subject.

"The purpose for which these Articles were designed," says he, "is stated to be 'the avoiding the diversities of opinion, and the establishing of consent touching religion.' It is quite repugnant, therefore, to this intention, and to all rational interpretation, to contend, as we have heard this day, that the construction of the Articles should be left to the private persuasion of individuals, and that every one should be at liberty to preach doctrines contrary to those which the wisdom of the state, aided and instructed by the wisdom of the church, had adopted. It is the idlest of all conceits that this is an obsolete act; it is in daily use, '*viridi observantiâ*,' and as much in force as any in the whole statute book, and repeatedly recommended to our attention by the injunctions of almost every sovereign who has held the sceptre of these realms.

"It is no business of mine, in this place, to vindicate the policy of any legislative act, but to enforce the observance of it. I cannot omit, however, to observe, that it is essential to the nature of every establishment, and necessary for the preservation of the interests of the laity, as well as of the clergy, that the preaching diversity of opinions shall not be fed out of the appointments of the established church; since the church itself would otherwise be overwhelmed with the variety of opinion which must, in the

great mass of human character, arise out of the infirmity of our common nature. For this purpose, it has been deemed expedient to the best interests of Christianity, that there should be an appointed liturgy, to which the offices of public worship should conform; and as to preaching, that it should be according to those doctrines which the State has adopted as the rational expositions of the Christian faith. It is of the utmost importance that this system should be maintained. For, what would be the state and condition of public worship, if every man was at liberty to preach from the pulpit of the church whatever doctrines he may think proper to hold? Miserable would be the condition of the laity if any such pretension could be maintained by the clergy.

"It is said, that Scripture alone is sufficient. But, though the clergy of the church of England have been always eminently distinguished for their learning and piety, there may yet be, in such a number of persons, weak and imprudent and fanciful individuals. And what would be the condition of the church if such person might preach whatever doctrine he thinks proper to maintain? As the law now is, every one goes to his parochial church with a certainty of not feeling any of his solemn opinions offended. If any person dissents, a remedy is provided by the mild and wise spirit of toleration which has prevailed in modern times, and which allows that he should join himself to persons of persuasions similar to his own. But that any clergyman should assume the liberty of inculcating his own private opinions, in direct opposition to the doctrines of the established church, in a place set apart for its own public worship, is not more contrary to the nature of a national church than to all honest and rational conduct. Nor is this restraint inconsistent with Christian liberty; for to what purpose is it directed, but to ensure, in the established church, that uniformity which tends to edification; leaving individuals to go elsewhere, according to the private persuasions they may entertain. It is, therefore, a restraint essential to the security of the church, and it would be a gross contradiction to its fundamental purpose to say, that it is liable to the reproach

of persecution if it does not pay its ministers for maintaining doctrines contrary to its own. I think myself bound at the same time to declare, that it is not the duty nor inclination of this court to be minute and rigid in applying proceedings of this nature; and that, if any Article is really a subject of dubious interpretation, it would be highly improper that *this court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding its interpretation.* It is a very different thing where the authority of the Articles is *totally eluded*; and the party deliberately declares the intention of teaching doctrines contrary to them.

“With these observations on the law, I have only to inquire whether the doctrine which this gentleman has preached is contrary to the Articles? That will be a very short discussion on the evidence which has been laid before the court.

“The first Article states the doctrine of the Trinity; the second, the Divinity of our Saviour, and the Atonement by His death and sacrifice. It is alleged that Mr. Stone has, in a sermon, publicly impugned these doctrines, and that he has since committed these sentiments to the press. It is not necessary that I should state the particular terms in which these fundamental tenets have been impugned. The court has heard those observations repeated more frequently than it wished, and more than could be agreeable, it hopes, to many of the auditors. Mr. Stone himself has admitted, and is ready to admit, more so, perhaps, than those who had the management of his defence would have advised, the total opposition of his doctrines to the Articles in question. I have listened with patient attention to what he has offered this day, but I find it little more than a repetition of his sermon. It is not necessary for me to go through the rest of the evidence, or to state the facts in detail. The preaching and the publishing are both abundantly proved.

“Then, what is the duty of the court? It cannot refuse its authority to carry into effect the statutes of the land. It might proceed immediately, as suggested by the King’s advocate, after the persisting in those doctrines which we have heard

this day, to pronounce the sentence of the law. But the court is disposed to act with the greatest indulgence to the party, and will now content itself with admonishing him, though not encouraged to expect any effect from this admonition, to appear the next court-day to revoke his errors, with an intimation that, if he does not obey this admonition, the court will feel itself under the necessity of proceeding to inflict the particular penalty which the statute directs."—(1 *Hagg. Cons. Rep.* 424 to 430.)

On the next court-day Mr. Stone tendered a paper, which the judge characterized as "a mere promise of *future* silence, but *no* *revocation* of past error;" and he proceeded to say, "I am, therefore, under the painful necessity of considering Mr. Stone as having declined to revoke his error, and to comply with the requisition of the statute; and I must direct the registrar to record that the party has not revoked his error. It is only necessary to observe further, that by the canons of the church (can. 122) it is prescribed, that when sentence of deprivation is to be passed, which I must declare to have been incurred by this offence, it must be pronounced by the bishop." Upon which, to complete the story, it appears that the Bishop of London was introduced into court, and, to give greater solemnity to the event, he was attended by the Dean of St. Paul's and two of the prebendaries. He then took the judge's chair, and the judge explained to him the nature of the offence, and the proceedings instituted against Mr. Stone. The bishop, thereupon, condescended to be the organ of the court, by reading and signing the sentence of deprivation.

The Church Discipline Act (3 and 4 Vict. c. 86) is the statute under which proceedings are now taken against ecclesiastics. Its provisions are most frequently resorted to to punish the immoral and vicious, but it applies equally to those disseminating damnable doctrine; and the provisions of the statute of Elizabeth, just referred to, may be enforced under the procedure enacted by the Church Discipline Act. This was decided in the judgment *ex parte Denison* (4 E. and B. 309). The third section of the last-named act of Victoria includes *any clerk* "charged with any

offence against the law ecclesiastical"—which language, Lord Campbell, C. J., held, "must certainly comprehend the charge of having preached heretical doctrine, doctrine contrary to the formularies of the church." It certainly, therefore, would comprehend the charge of advisedly maintaining or affirming, in the published *Essays and Reviews*, any doctrine repugnant to the Thirty-nine Articles.

The case of Denison just referred to, arose out of the notorious dispute between him and Mr. Ditcher, and this was another instance of the law being invoked to punish a heterodox pastor. The quarrel was not allowed to be terminated by the temperate, liberal, and Christian-like interposition of the bishop.¹ The opportunity was too good, and the object of attack too attractive, to admit of hostilities ceasing. The edifying exhibition was therefore presented of a malignant war between two ecclesiastics representing two parties in the church, whose theological opinions are obviously more antagonistic to each other than they are respectively to those held by the Essayists and Reviewers. If the Ditcherites are orthodox, the Denisonians are heretics. This is obvious, and on this particular occasion the archdeacon and his friends were adjudged to be the enemies of the church and of theological truth. The archdeacon luckily escaped from the consequences of his crime by a technical point (viz., by showing that the proceedings were taken a few weeks too late), and he has, indeed, survived the blow to become an active member of Convocation, and is now a jubilant and vigorous persecutor of the Essayists, being chairman of the committee charged with the duty of devising proceedings against them. He will be able, therefore,

¹ Bishop Bagot, in writing to the Archdeacon about the dispute, employed language which it would be well if the convocated priests would now consider. He says, concerning the speculations in which Dr Denison had been indulging, "I do not consider it to be my duty to seek in our ecclesiastical courts for an authoritative decision thereon, and thereby narrow the terms of communion in our church." Again he remarks, "I am unwilling in any way to lessen the liberty of thought which she has allowed by seeking to obtain such a formal censure; yet I feel it to be my duty as your Bishop, to condemn the boldness with which you seem to me to have put it forward as being a truth necessary to be held by every faithful member of our church, and to admonish you for the future (if you claim the liberty which in my judgment the church allows you of holding, and of advocating which she discourages, your opinion) to maintain it with moderation and charity, and to abstain from condemning, as ignorant or unfaithful members of the church, those who like myself regret your views."

to experience the difference which it is said is felt between hunting and being hunted.

There is yet another case now pending, in which the *Rev. Dunbar I. Heath*, the vicar of Brading, has been brought before the court for preaching heresy in his sermons—the Bishop of Winchester having been instigated to proceed against him by some zealous neighbours of the vicar. The "sound churchmen" are exhibited in rather a foolish position in this case; but they have been now taught the valuable lesson, that vague charges, however common in society, and commendable in Convocation, public meetings, petitions, and addresses, are held in contempt by the law. The prosecutors contented themselves, we understand, in alleging that Mr. Heath had published, in two sermons, certain matter which was contrary to certain Articles; and though they set out the passages in the sermons, they omitted to state what was the doctrine therein contained of which they complained. This would not do, and the Articles were remitted to be amended and rendered specific; and the promoters of the suit will have properly and fairly to show the court that what Mr. Heath has published is "directly contrary and repugnant to the Articles," which is a very different thing to affirming that it is not agreeable to the clergy inhabiting the Isle of Wight.¹

We are afraid the sole reason why proceedings are not more frequently taken by and against clergymen for heresies, is derived from the undeniably liberal character of the costs in

¹ The reader should refer to *Hodgson v. Oakeley*, 4 Eccl. Ca., 180.—This was a case belonging to the time when certain of the clergy claimed to subscribe in the *non-natural* sense. Mr. Oakeley had written a letter to the Bishop of London, in which he declared that "the Articles were subscribable in an ultra-Catholic sense, so as to occasion no unnecessary renunciation on the subscriber's part of any formal decision of the writer's church, and Mr. Oakeley declared that he did so subscribe them. Proceedings were therefore taken against him by letter of request, calling upon him to answer the charge of having, by his publication, offended against the laws ecclesiastical. Mr. Oakeley did not appeal by counsel, but the promoter did. The Articles against Mr. Oakeley were, said the Judge, "very general;" passages from the pamphlet were set forth, and "the court has to collect the proof of the charge against Mr. Oakeley;" and he added, that if the proceedings were under 13 Elizabeth, there would be great difficulty in calling on him to answer the charge. The proceedings "were under the general law," and, no defence being set up, Mr. Oakeley had his licence revoked, and was inhibited from performing ministerial office.

ecclesiastical courts. No greater injury could be inflicted on the church than to cheapen this division of litigation, for the number is large of those who would be glad to vindicate before the world their own soundness by persecuting others, and establishing the heterodoxy of their neighbours. Party spirit is so strong, and sectarian animosity so virulent, that the peace of the church would be destroyed, or its existence imperilled, if greater facilities were given for litigation among ecclesiastics. For the most part, the construction put by the judges upon the disputes of the kind of which we are speaking, is liberal, temperate, and favourable rather to giving latitude to, than curtailing the limits of opinion. Take, for example, the judgment in the case of *Gorham v. Bishop of Exeter* (1 Cripp's Church and Clergy Cases 266) which was not raised upon the statute of Elizabeth, but occurred by reason of the Bishop refusing to institute Mr. Gorham, because his views on baptism were erroneous; but the judgment in the appeal (which reversed that given below) is important, as containing principles which must be regarded in any litigation which the "Essays and Reviews" may call forth. It was laid down by Lord Langdale, that—1. If the Articles of the Church of England admit in any case of different interpretations, any sense of which the words fairly admit, so long as it be not repugnant to what the church has elsewhere allowed or required, may be allowed. 2. If such Articles are silent or ambiguously expressed upon any particular doctrine, it may be supposed that such doctrine was intended to be left to private judgment; and upon such doctrine all members of the church, having duly subscribed the Articles, and taken Holy Scripture for their guide, are at liberty to exercise their private judgment, without offence or censure.

The possibility, says Lord Langdale, of probable difference of interpretation may have been designedly intended, even by the framers of the Articles themselves; and he urges that in such cases it seems perfectly right to conclude that those who impose the test command no more than the force of the words, employed in their literal and grammatical sense, conveys

or implies; and that those "who agree to them are entitled to such latitude or diversity of interpretation as the form admits." The question in Gorham's case, decided eleven years since, was upon the efficacy of baptism, upon which, views palpably contradictory are held and expressed by churchmen, and about which, moreover, our Articles and Formularies *appear* to be, without really being, most absolute, dogmatic, and determined. The mere fact, says Lord Langdale, that real opposite opinions "have been propounded and maintained by persons so eminent and so much respected, as well as by very many others, appears to us sufficiently to prove that the liberty which was left by the Articles and Formularies has been actually enjoyed and exercised by the members and ministers of the church of England." The Bishop of Exeter had tried to trap the priest by torturing him with one hundred and forty-nine questions in examination, but the latter escaped, and finally tripping up his superior, leaped cheerfully over his mitre into the preferment for which the Bishop protested he was unfit by reason of unsoundness of doctrine.

The persons who profess to feel aggrieved by the speculations of the writers of "*Essays and Reviews*," may content themselves with sending deputations, or bringing up addresses to each other, or with exulting over the errors of the heretics, and mutually congratulating one another on their own orthodoxy. But they may also attempt to carry out their threats, and prosecute the six clergymen according to law. If so, they must, as in Mr. Heath's case, be prepared with specific allegations. What these may be, we may perhaps gather from Dr. Jelf's pamphlet,¹ which he entitles "*Specific Evidence of Unsoundness*;" though the term "unsound" is as vague and improper, as it is popular with all sorts and conditions of sectarians. Does he mean by unsound, what is "false, strange, and damnable," or what is "incomplete," "informal," "irregular,"

¹"*Specific Evidence of Unsoundness*, in the volume entitled '*Essays and Reviews*,' submitted to the Lower House of Convocation, Feb. 26, 1861, on moving an Address to the Upper House with a view to synodical censure; by R. W. Jelf, D.D. Oxford, J. H. and J. Parker, and Rivington, Webster, & Co., 1861."

“unecclesiastical,” or merely what is generally disliked in this particular year, and by the parties at present prevailing in the church? But whatever Dr. Jelf and his friends may mean by this term, we may assume that he has selected, to the best of his ability, the passages which are most open to the charge of being actually and legally heretical, not merely distasteful to himself and his party. Dr. Jelf says, “I shall begin with errors touching Holy Scripture,” and he presents passages which he says are contradictory in language and effect to the sixth Article throughout.¹ We have no manner of doubt that it is out of the power of Dr. Jelf to sustain this charge, for his notion of what the sixth Article says and means, is based altogether on an infelicitous operation of his imagination. The Article VI. is as follows :—

“Holy Scripture containeth all things necessary to salvation ; so that whatsoever is not read therein, nor may be proved thereby, is not to be required of any man that it should be believed as an Article of Faith, or be thought requisite or necessary to salvation. In the name of the Holy Scripture we do understand those canonical books of the Old and New Testament, of whose authority was never any doubt in the church.

[Then follow the names of the Canonical Books, beginning with Genesis down to the twelve Prophets the less] :—

“And the other books (as Hierome saith), the church doth read for example of life, and instruction of manners ; but yet doth it not apply them to establish any doctrine.

Then follow the names of the Apocryphal books, and it is added :—

“All the books of the New Testament, as they are commonly received, we do receive and account them canonical.”

Now, of all the curious interpretations of this Article, Dr. Jelf's is the drollest. He holds that it affirms, 1st—that we are to receive the

¹ This is the loose way in which he brings his charges. “We present the following passages, as teaching that we are not to receive the canonical Scripture as the rule of faith, but are to judge of the credibility of the statements contained therein by an assumed verifying faculty within ourselves ; and are thereby in language and in effect contradicting the sixth Article throughout, and especially the words, ‘*The church doth read the other books* for example, and for good instruction of living, and yet doth it not apply them to establish any doctrine,’” &c. &c.

canonical Scriptures as our "*Rule of Faith*." 2nd—That it forbids us to judge of the credibility of the statements they contain. Any one not being a clerical controversialist must see, however true or false the propositions may be in themselves, that by no perversion of language could Article VI. be made to express either of them.¹ Nay, we go further and say, that its frame suggests the high probability, that these were just the propositions this Article, as well as the other thirty-eight, was meant *not* to affirm. The sixth Article is negative in expression, and it appears to be purposely vague and wide in language, and is silent about "*Rule of Faith*," and degrees of credibility. Further, on looking at the various extracts which Dr. Jelf has undertaken in Convocation, solemnly to charge as repugnant to the sixth Article, we do not find even one that a logical mind would for one moment admit was properly selected. With Article VI. before him, let any lawyer, or indeed any man who can logically connect ideas together, try to make out a case against the Essayists founded on the extracts which Dr. Jelf adduces in support of his charge. We will take casually three examples which Dr. Jelf has cited as being in flagrant contradiction to this Article:—

(1.) "It is time for divines to recognise these things, since with these opportunities of study, the current error (as to the *age of the Book of Daniel*) is as discreditable to them as, for the well-meaning crowd who are taught to identify it with their creed, it is a matter of grave compassion."—(*Essays and Reviews*, quoted by Dr. Jelf, p. 16.)

Again,—

(2.) "The original meaning of Scripture is beginning to be clearly understood. But the apprehension of the original meaning is inconsistent with the reception of a typical or conventional one. The time will come when educated men will be no more able to believe that the words—'Out of Egypt have I called my son' (Matt. ii. 15—Hosea xi. 1), were *intended* by the prophet to refer to the return of Joseph and Mary from Egypt, than they are now able to believe the Roman Catholic ex-

¹ Dr. Jelf also complains that the passages he quotes are repugnant to the declaration made by candidates for Deacon's orders. We presume none of the six are candidates for Deacon's orders. He says also they are inconsistent with the rubric, &c. &c. But this is not established, nor is it the question at issue.

planation of Genesis iii. 15, '*Ipsa conteret caput tuum.*' They will no more think that the first chapters of Genesis relate the same tale which geology and ethnology unfold, than they now think the meaning of Joshua x. 12, 13, to be in accordance with Galileo's discovery."—(*Essays and Reviews*, quoted by Dr. Jelf, p. 20.)

The third extract which we will give is as follows :—

(3.) "Whether the habit of mind which has been formed on classical studies will not go on to Scripture; whether Scripture can be made an exception to other ancient writings, now that the nature of both is more understood; whether, in the fuller light of history and science, the views of the last century will hold out—these are questions respecting which the course of religious opinion on the past does not afford the means of truly judging."—*Ibid.* p. 20.

Now it is simply idle to pretend that these extracts impugn Art. VI; and we should have supposed that it did not require a legal education to have seen that no case could be sustained upon them. It is impossible to argue on them; for, after the mere comparison of the letterpress of the extracts and the article, all that is left to one is to say, "We cannot see your points in reason, and decline to accept your authority."

"Count" II. of Dr. Jelf's pamphlet of charges is entitled, "Inspiration Denied." If this learned divine intends his speech and pamphlet, seriously and practically, to be an indictment (and it is difficult to conceive that he meant to condescend to assume the position of a mere church-newspaper critic), how he came to invent this heading, and support the charge thereunder as proposed, passes one's comprehension. "Inspiration" is nowhere defined by the church in her Articles or elsewhere; and among the bishops in the Upper chamber and the reverend gentlemen in the Jerusalem chamber—all "sound" Churchmen of course—Dr. Jelf will find shocking diversity of opinion starting from the "plenary" theory, which most of them would denounce as the foolishness of ignorant men, up to the "dangerous" views of Mr. Jowett. The following is the first passage which Dr. Jelf picks out to support the count in his indictment founded on inspiration :—

"Nor for any of the higher or supernatural views of inspiration is there any foundation in the gospel or epistles. There is no appearance

in their writings, that the evangelists or apostles had any inward gift, or were subject to any power external to them different from that of preaching or teaching which they daily exercised ; nor do they any where lead us to suppose that they were free from error or infirmity."—(*Essays and Reviews*, cited by Dr. Jelf, p. 21.)

A passage which, whether erroneous or not, is manifestly insufficient for Dr. Jelf's purpose. He follows it up, however, by contrasting it with certain passages of *Scripture*, the cogency of which contrast does not affect the dispute, but about the value of which biblical critics have an opportunity of quarrelling. We enter not on the thorny road.

Under count III., headed "Miracles Denied," no visible case is made, but general averment is introduced.

Under count IV. we, however, again get to particulars. It is headed "Prophecy predictive denied." The extract which is given is too long to be repeated here.¹ But it is alleged that it impugns "prophecy predictive," and that it therefore contradicts the *seventh* Article.²

Count VII. touches "original sin." The writer of one of the Essays (p. 86, 3rd Ed.) speaks of the "*Augustinian notion of a curse inherited by infants.*" Dr. Jelf presents this as being in direct contradiction to Article IX. But this Article does not even allude to the "Augustinian notion of a curse." Dr. Jelf's gloss on the passage is, that the writer means the doctrine of original sin is false, and was introduced by St. Augustin ; and if Dr. Jelf, like the Bishop of Exeter, could put 149 questions upon original sin, the curse (a word not used even in the Article IX.), and St. Augustin, he might perhaps torture Mr. Williams into being a heretic ; but at present he has not succeeded.

¹ From the Essay on Bunsen, pp. 69-71, 3rd ed., referring to Bunsen's repudiation of a Messianic meaning of certain passages in the Old Testament.

² That our readers may really see the idle character of this charge, by comparing the indictment with the text of the article, we will print Article VII. in full. "The Old Testament is not contrary to the New ; for both in the Old and New Testaments everlasting life is offered to mankind by Christ, who is the only mediator between God and man, being both God and man. Wherefore they are not to be heard who feign that the old fathers did look only for transitory promises. Although the laws given from God by Moses as touching ceremonies and rites do not bind Christian men, &c., &c. [The rest of the Article is not relevant to the charge.]

Count VIII. touches the denial of the Atonement, of which we have only space to declare our own view, which is, that though the essay from which the extract is taken appears to us to be altogether at variance with the generally received construction of Articles II. and XXXI., yet we do not say that the writer could not reconcile his language with that of the Articles. We are, however, not astonished at Dr. Jelf making an effort—more successful than most, but far from conclusive—to fix the writer he quotes with the charge of heterodoxy.

Count IX., on Ideology, is an attempt to make Mr. Wilson (at pp. 201-203) impugn the eighth Article (which says the three creeds ought to be received). It is too vague and weak an attempt to require further notice. This is the last count, and concludes the indictment.

The main question which we have to consider in this case is, Can ecclesiastical lawyers frame better counts, and find better evidence against these *Essays and Reviews*, than Dr. Jelf and his brother divines have succeeded in prescribing for their own friends and partisans? We think not; though the lawyers, of course, would avoid committing themselves so egregiously. If there be no legal case against the essayists there is no case at all, though their views be wrong and their writings unsatisfactory; for, as we have shown, the latitude in the national church which the law allows, affords the true latitude which each Englishman may claim. The idea of diversity of opinion includes that of degrees of error; for truth can only be one, and in no way susceptible of degree or modification.

It has been said that this latitude seems rather to be of the nature of a compact entered into by subscribers to the Articles, by which it is mutually covenanted that each may confess to what he does not believe, in consideration that the others may say what they do not mean. We do not admit this; but, practically, it is beyond all question that, in the exercise of a common charity, every man in orders should, as far as possible, until the contrary is legally established, hold that his neighbour is as honest as himself. We must recollect that this is a conventional under-

standing, not only as to the neglect of what is obsolete, but as to the signification and use of ordinary language and the meaning of forms. This is especially the case in ecclesiastical affairs, where centuries have elapsed since the Articles and Formularies were compiled; and it is impossible that one generation can impose upon those who succeed, the identical ideas that it held, or affix the identical meaning to the language of such formularies as have been preserved. Educated men of the seventeenth and nineteenth centuries stand in a different relation to knowledge. But now, more than ever, the parties in the Anglican church are at such a dead-lock, that any modification of the present system is almost impossible.

Another point is, what is to be thought of the recent angry attacks upon the *Essays and Reviews* in and out of Convocation? An attempt has been made to treat the seven writers not only as heretics, but as persons wilfully guilty of falsity, and this without adopting either of the two methods open to the censors, viz., those of the weapon of the pen and of the law—reason and authority. Churchmen are seen inciting each other to the ignoble task of lowering the standard of orthodoxy—limiting the range of investigation—and contracting the freedom of expression. Persons having authority in the church, and persons having none, either there or elsewhere, have attempted, by assumed power and clamour, to put down the volume and its authors; and, supported by a mob of the inferior clergy, the bishops have distinguished themselves in this direction. In a protest to the Bishop of Salisbury, Mr. Kennard has well said, "On my own part, and on that of my brethren in the diocese, the range of whose studies is likely to lead them to approve of the general spirit of the work in question, I can assure your lordship that we shall be always ready to listen respectfully, on all fitting occasions, to the opinions of our ecclesiastical superiors, however much they may differ from our own; but, in doing so, we claim for ourselves the right, limited and restrained solely by the laws of the realm, of publishing our own sentiments and the results of our researches freely and without reserve; nor do we conceive that in exercising this right, subject to such limita-

tion and restriction, we render ourselves liable to ecclesiastical censure, direct or indirect, of any kind whatever. I beg therefore, as a clergyman of the diocese of Salisbury, respectfully to protest, and I do hereby formally and officially protest against the assumption, on the part of your lordship, of the power to express such censure, prior to the judgment, and without the sanction, of any duly constituted court of law.”¹

The irregularities and ebullitions of bigotry which we have noticed, have chiefly been caused by the conduct of Convocation and its distempered action. It reminds us (to compare small things with great) of the Hoadley or Bangor controversy. As Hallam has well said, “ecclesiastical assemblies have, in all ages and countries, been mischievous where they have been powerful, which that of our wealthy and numerous clergy must always be.” To the common pleas for such institutions he replies, “that if, notwithstanding, the Convocation could be brought under the management of the State (which by the nature of its component parts might seem not unlikely), it must lead to the promotion of servile men, and the exclusion of merit still more than at present; that the severe remark of Clarendon, who observes, that of all mankind none form so bad an estimate of human affairs as churchmen, is abundantly confirmed by experience; that the representation of the church in the House of Lords is sufficient for the protection of its interests; that the clergy have an influence which no other corporation enjoys over the bulk of the nation, and may abuse it for the purposes of undue ascendancy, unjust restraint, or factious ambition; that the hope of any real good from reformation of the church by its own assemblies, to what-

¹ A protest addressed to the Right Rev. the Bishop of Salisbury, &c., by the Rev. Robert Orme Kennard, Rector of Marshall Dorset. London: Hardwick, 1861. The author reminds us that Hooker was denounced by his contemporaries as a contemner of scripture; Jeremy Taylor as a Pelagian; Chillingworth as a Socinian; Butler as a Papist and Deist; Paley as an Infidel. That when Burnet was impeached by the *Lower House of Convocation* for teaching strange doctrines in his “Exposition,” the Upper House replied, “That the Lower House had no manner of power to censure any book;” and further, that the Lower House censuring a book generally, without mentioning particular passages on which the censure is grounded, is “defamatory and scandalous.” How infinitely more scandalous to mention passages which obviously are inapposite!

ever sort of reform we may look, is *utterly chimerical*; finally, that as the laws now stand, which few would incline to alter, the ratification of Parliament must be indispensable for any material change." The recent proceedings in Convocation, in relation to the *Essays and Reviews*, will not a little confirm Mr. Hallam's views, at least among laymen and constitutional lawyers.

ART. II.—RECENT WORKS ON THE STATUTORY JURISDICTION AND GENERAL ORDERS OF THE COURT OF CHANCERY.

1. *A Treatise on the Statutory Jurisdiction of the Court of Chancery, with an Appendix of Precedents.* By WILLIAM WHITTAKER BARRY, Esq., of Lincoln's Inn, Barrister-at-Law. London: V. and R. Stevens & Sons. 1861. Pp. l.—411.
2. *The Orders, Statutes, and Regulations affecting the Practice of the Court of Chancery; with Notes.* By HOMERSHAM COX, M.A., Barrister-at-Law, author of the "British Commonwealth," and Treatises on the Differential and the Integral Calculus. London: Henry Sweet. 1861. Pp. lxxvi.—552.
3. *The Statutes, General Orders, and Practice Cases of 1860-1.* By GEORGE OSBORNE MORGAN, M.A., of Lincoln's Inn, Barrister-at-Law. London: Wildy & Sons. 1861. Pp. 76.

THE prodigious increase that has of late taken place in the number of books issued from the press, produces consequences which make themselves felt in every department of our literature; and, although this multiplication has had greater effect upon those branches of writing that appeal principally to imagination than upon those of a more intellectual character, yet these latter have by no means escaped the influence. Works on subjects of archæological and antiquarian research are now

far from being distinguished by that dry character for which they were proverbial in the earlier part of this century ; writers who go deepest into questions of theological and moral science, adopt a style such that their Essays are more eagerly sought from Mudie's library than is any volume of poetry or romance ; and law-books not unfrequently appear, regarding which we may fairly suppose that the writers attended in some degree to language and arrangement, as well as to fulness and accuracy. As long as the latter qualities do not suffer, no one can fail to rejoice at the presence of the former.

Of all the subjects to which a practitioner of the law must direct his attention, none is more important, nor in itself so dry, as that which relates to the practice of the Courts. Most minds find a certain pleasure in observing the deduction of particular consequences from general propositions, whatever be the subject with which they are conversant ; and this pleasure may be derived from the perusal of such works as Fearn's *Contingent Remainders*, Mitford's *Chancery Pleading*, and Wigram on *Discovery*, or of the judgments in any cases whereby important points of law have been determined or illustrated. But no such pleasure can be derived from treatises on Practice. Here reasoning has no place, and in cases unprovided for by the positive enactments of statutes and orders, appeal must at once be made to the memory, and what may be called official instinct, of the gentlemen to whom the routine business of the Court is intrusted. Nevertheless, the difference between books of practice, in respect of their *readable* quality, is as great as between books on any other subject ; and both student and practitioner do well to attend to this quality, which is of considerable importance for the purposes of as well the one as the other. As will presently be pointed out, a marked difference exists in the arrangement and mode of treatment adopted by Mr. Barry and Mr. Cox upon very similar subjects, and we are at once struck with Mr. Barry's superiority in regard to the readable nature of his work.

Among the other changes effected by the revolutions in Chancery practice brought about by the Statutes and Orders of

1852, not the least remarkable is the alteration that has taken place in the plan of the works now published which treat upon the subject. No attempt has, we think, been made to compose a regular treatise on the new practice; all that has been done has been to state with more or less fulness the old practice, and then to give those portions of the recent statutes and orders which bear upon it, with notes of any cases in which the construction of the statutes and orders has been judicially determined: on all points which have not yet been determined by reported decisions, the reader is left to form his own conclusions as to the practical effect of the modern alterations. The adoption of this course was probably unavoidable at first, when decisions were few and doubts plentiful; yet we cannot but think that the time is now come when the multitudinous accumulations of eight years of competing series of reports, might be digested into a systematic treatise on the now existing practice. We suppose, however, that the works of Mr. Headlam and Mr. Sidney Smith are so well established, and in such repute, that there is scarcely room left for a third, even upon a plan theoretically preferable; and in fact, with the aid of works of the class to be next described, little or no difficulty is felt in ascertaining all that there is to be known on the present practice. Moreover, the series of changes commenced in 1852 can hardly yet be considered at an end; for the system of taking evidence, then established, having been subverted in 1855, has within the last few weeks been again entirely changed; similar revolutions may occur in other branches of the subject, and no one will be willing to expend his labour upon the composition of a formal treatise, until confidence is felt that no new statute or order will overthrow the whole system described, even while the book is passing through the press.

The class of works to which we have alluded is of a far less ambitious character than those last characterized, but we venture to say not less useful. It is very numerous, and contains works of very various degrees of merit, nothing being easier than to produce a bad or moderately good work of the kind, while few

literary tasks are more difficult than to exhibit the powers of arrangement, foresight, and accuracy that are requisite for the achievement of first-rate success ; and where these qualities are present, it is far from uncommon to find that the gifted author is wholly destitute of the humbler virtue of industry. We refer to books which collect the statutes and orders, or other authoritative documents upon some particular subject, in a full or abridged form, and arrange them under appropriate heads, thus producing a digest or consolidation of the written law upon the subject. Notes are then appended, comprising often a sketch of the old law on the subject, and sometimes an extract from a report of commissioners, in which is contained some recommendation of the new system ; this, however, is only found where the learned editor is hard pressed by the need of what school-boys term "fill-up."¹ The notes also contain some conjectures (the fewer the better) as to the construction which will be put upon doubtful texts, and perhaps criticisms on the policy of the alterations, with which also the purchaser is generally willing to dispense.

The valuable part consists of the abstracts of cases, and here the notes generally profess to contain notices of all the reported cases bearing on the subject, nor does the performance always fall short of the profession. The well-known work of Mr. Morgan has been said to be absolutely perfect in this respect, though we think we have once or twice met with cases which ought to have, but have not, found a place there ; and Mr. Cox's collection appears to be as full as that of his older competitor. Mr. Barry's subject is narrower, and we have taken some pains in examining his work with a view to this point. As we shall show hereafter, his table of contents hardly goes so far as his

¹ The Lord Chancellor has introduced a new practice in the statute 23 & 24 Vict. c. 128, for which he is responsible : to this enactment a report of commissioners is as it were made an *exhibit* ; but our remark is not intended to apply to such a very exceptional case, in which clearly the report ought to be printed, with every edition of the Act and the orders under it. May not questions of *ultra vires* arise, if the orders do not literally follow the recommendations ? We leave the point to the consideration of gentlemen whose clients may have reason to object to the system of *viâ voce* examination.

titlepage; but we believe that no case is omitted which has any bearing on so much of his subject as is dealt with in his pages. Absolute certainty on this particular is as unattainable as probably is absolute perfection.

We have called works of this class not less useful than more formal and ambitious treatises; and in fact, for the purpose of the practitioner, they may be made the most convenient shape in which can be conveyed a solution of his problem, "given a point, to find the authorities bearing upon it." This is done by means of a good index, the presence or absence of which is one of the principal criteria by which the prudent book-buyer will be guided in the selection of works to be added to his collection of implements of trade. It is here, and not in the anticipation of doubts, that foresight becomes useful. These books are in general less convenient than regular treatises for the use of students of the law, who seek an answer to the question: "given a subject, what points concerning it have been raised and how decided?" and it is only when the style and arrangement have received more than an ordinary share of the editor's attention, that we can recommend works of this nature to the attention of beginners.

The works by Mr. Barry and Mr. Cox, of which the titles stand at the head of this article, belong to the class last described, and relate to the practice of the Court of Chancery; but there is little further resemblance between them. Mr. Barry, as far as we remember, has not hitherto appeared before the public as an author. Mr. Cox, on the other hand, as we learn from his titlepage, has contributed various works to various departments of literature. We are, therefore, prepared to expect that in clearness of style, and in other qualities in which practice is almost essential to excellence, Mr. Barry may possibly be found deficient, while we may expect to receive from Mr. Cox a work in which literary merit will be conspicuous. On looking into the books, however, we think the truth is the reverse of this. But we must state more particularly the nature of the two works.

Mr. Barry professes to treat upon the Statutory Jurisdiction of the Court of Chancery. This title has by some been understood to imply, that the author would include all the statutes which in any way affect the jurisdiction of the court, in which view, his omission of the important acts of 1852, by which the practice in suits was so much altered, would be unpardonable. But to our mind the title seems to promise nothing of the kind; the statutory jurisdiction is that part of the jurisdiction which is based upon statute, as distinguished from that which may be termed the original extraordinary jurisdiction of the court. Now, with a trifling exception in the case of infants,¹ all appeals to the original jurisdiction are necessarily commenced by bill; while in the cases where a new jurisdiction is conferred by statute, the court is usually empowered to make orders upon motion, petition, or summons, in a summary way. Hence the statutory jurisdiction is practically that which does not require a bill to be filed, and under which orders are made in what are technically termed *Matters* and not *Suits*.

This notion of the meaning of Statutory Jurisdiction appears to be that which the author had in his mind in selecting his title; and he truly tells us in his preface, that the ordinary books of practice contain only a very general statement of this branch of the jurisdiction, and that there appeared to be an opening for a regular treatise upon it. But in the same preface he candidly avows that he does not aspire to completeness in his treatment of it, but omits the winding-up acts, as being of so distinct a character, and in such a transition state as not to be conveniently comprised in his plan. Now this really seems a very serious omission, and one which the reasons given by no means justify. We fully admit that there is one kind of convenience which attends the avoidance of any attempt to state the present law upon this head, or to explain those self-contradictions of hasty and ignorant legislators, which enabled the avarice of contending official managers and assignees, striving for the spoils

¹ Even here a large proportion of the orders made are based on the statute 1 Wm. IV. c. 55, of which Mr. Barry treats at length in his fifth chapter.

of defunct companies, to exhibit to the world the scandalous spectacle of one of Her Majesty's courts committing to prison persons whose sole offence was, that they acted in obedience to the orders of the same sovereign speaking through another court. But, however difficult, or indeed impossible it may be, to give a consistent meaning to the mass of contradictory enactments and one-sided decisions which bear on the subject, there surely is no reason why a writer should omit the subject from a treatise of which it forms a natural part; nor can we admit the excuse, that the winding-up acts are of a distinct character from the others discussed in the pages before us. We should not expect to find here any notice of the numerous cases which show by what arguments persons, concerned in losing speculations, have endeavoured to escape from their share of responsibility—these rather belong to works on Partnership or Joint-Stock Companies; but we did expect to learn from Mr. Barry in what cases recourse could be had to this statutory jurisdiction, and what was the mode of proceeding under it, the more so because no formal treatise that we have met with makes any attempt to deal with this branch of the subject.

The omission of the winding-up acts is alone acknowledged by Mr. Barry, and it is doubtless the most important; but we have looked for, and failed to find any notice of two other enactments which are at least as much acted on as some that are given; ¹ these are the sections of Sir George Turner's Act, under which an administration order can be obtained by executors (13 & 14 Vict. c. 35, ss. 19—25); several decisions on these sections, are given by Mr. Morgan and other writers, and the procedure under them was facilitated by a section of Lord St. Leonards' Act of last session, (23 & 24 Vict. c. 38. s. 14.) The other enactment of which we have remarked the omission is 16 & 17 Vict. c. 137, ss. 39, 40, by which an appeal to the Court of Chancery is given from decisions of county court judges in charity cases. We are at a loss to reconcile these omissions with the industry and ac-

¹ Mr. Barry has inserted a notice of the Irish Investments Act, which recent enactments have rendered altogether obsolete.

curacy displayed by the author in the treatment of the statutes which he does admit.

Industry and accuracy, as we have already said, are qualities which may clearly be ascribed to the composition of this work ; but this is not all, it is also *readable*. We do not say it is lively, no book on the subject is ; and indeed we hold that no subject in itself grave was ever yet treated in a lively style without a serious loss in other and far more important respects. The plan of arrangement adopted is such, that statutes and cases form, as it were, one book, and not, as is often the case with these publications, two books intermixed on the same page. The student will appreciate the advantage of this mode of combining the two essential parts of the work, especially when he is told that the type is uniform throughout ; to our eyes, the alternate perusal of larger and smaller type is so tiring, as to cause a serious addition to the inconvenience of the plan ordinarily adopted in editing statutes with notes.

The reader should be told that the statutes are not given at length, but the substantial part of each section is given, with such alterations only as are necessary to adapt it to the context. This course involves a certain liability to error, although we have not observed any instance in which any difference of construction appeared possible between the full words and Mr. Barry's form ; every practitioner must form his own judgment how far he can safely dispense with the *ipsissima verba* of the legislature.

A very important feature of the book remains to be noticed : it is an Appendix of Precedents, containing forty-four forms, and occupying seventy pages. We here find forms of petitions, notices of motion, &c., in a great variety of the most usual cases of appeal to the statutory jurisdiction ; and a sketch of the necessary affidavit is added wherever any difficulty could possibly arise. This appendix at once illustrates the two introductory chapters on petitions in general, and on affidavits, which in themselves will well repay perusal, and affords a body of examples by which the younger members of the bar will be enabled to become acquainted with the proper forms of pleading,

before acquiring that experience which time alone can give to any of us.¹

Finally, we have to notice how Mr. Barry has performed a part of his task, which, as we have remarked, is of especial importance in books of this nature; we mean the index and table of contents. The former seems as full as can be desired; the latter is arranged on the plan of giving a short abstract of each paragraph, and affords very peculiar facilities for the discovery of the page on which are collected the authorities relating to any particular point. The saving of time thus effected will be appreciated by all overworked practitioners.

While we have no hesitation in saying that Mr. Barry has excellently achieved a work much needed by the profession; for Mr. Cox, we regret, we can hardly say as much. In the first place, his book seems to be identical in its range with the well-known compilation of Mr. Morgan, of which the first edition was eagerly bought up as an indispensable assistant in the application of the new acts and orders to the business of the court. Mr. Morgan's reputation as an editor was at once established, and was fully sustained by his second edition, in which the whole of the consolidated orders were subjected to the same treatment as the new orders underwent in the first edition. Moreover, from the nature of the work to be done, two distinct books attempting it must necessarily be in great part identical; indeed, the nearer they approach to ideal perfection, the nearer also they approach to identity. Mr. Cox says in his preface, alluding to Mr. Morgan's work, that the subject treated upon is so vast, that two independent labourers may be usefully employed in the work of illustrating it; but he does not appear to have adverted to the distinction, that independent labourers may be usefully employed in illustrating a subject which admits of variety in the mode of treatment, and of the deduction of various conclu-

¹ Why does not some member of the Chancery Bar give to the profession a treatise on the modern system of Equity pleading, with precedents, similar to that which Messrs. Bullen and Leake have furnished to the common lawyers? What is commonly said, that all Equity pleadings are special, would not, we are persuaded, be any real difficulty.

sions from various lines of argument; but that independent labour is thrown away in the production of the result of what is in fact a merely mechanical process. Mr. Cox is a mathematician, as we learn from the titles of former works on the *Differential and Integral Calculus*, of which his titlepage tells us he is the author. Did it never strike him, that although two or twenty writers might be usefully employed in illustrating the theory of logarithms, yet to calculate the table of logarithms in duplicate (except by way of precaution to avoid mistakes) would be altogether useless labour? The distinction is, that no two writers would treat the theory in the same manner; while the two tables would differ only in the comparatively trifling details of typographical arrangement.

For these reasons we cannot think that such a work as Mr. Cox has produced was in any degree necessary; nor is our opinion on the subject changed by the pathetic explanation that Mr. Cox had, "in pursuance of an agreement with the publisher," written a considerable part of the present volume before the publication of Mr. Morgan's edition of the consolidated orders; and that he had been engaged for several years previously in collecting materials. We know well that the love of offspring, common to all animals, renders it difficult to abandon a project on which labour has been expended; but we do not see that the publication of a useless book is in any degree justified by the fact, that if it had been published at some former period it would have been useful. We do not expect that many purchasers will allow themselves to be moved by this argument *ad misericordiam* as long as Mr. Morgan's work is procurable; when the stock of this is exhausted,¹ gentlemen who have omitted to provide themselves with it, will doubtless have recourse to Mr. Cox, and at once procure a collection of cases on the consolidated orders, and improve their own moral being by yielding to the emotion of pity. Tenderness of heart, engendered by this passage in the preface, will not be without its influence when they apply in the

¹ We learn, from the advertisement prefixed to Mr. Morgan's *Supplement*, that this will soon be the case. The friends of Mr. Cox may congratulate him.

course of business the knowledge of Chancery practice derived from the body of the book. "*Misericordia et veritas obviaverunt sibi; justitia et pax osculati sunt.*"¹

After all, the previous publication of Mr. Morgan's work is a mere unfortunate accident, in no degree attributable to Mr. Cox; but we are sorry to observe marks of haste and carelessness for which he alone can be considered responsible. Thus, we often find words like the following printed as a separate paragraph:—"Note to 15 & 16 Vict. c. 86, s. 50," (p. 180,) no difference of type or other mark showing that this is to be looked on as a title to what follows. We think that this gives us an insight into the method followed in the composition of the book; probably memoranda of the various cases were taken from the reports on slips, to which a heading was added, showing the rule or section which the case illustrates; the slips were then arranged so as to bring together all bearing the same heading, and the work was done. The carelessness of which we complain is shown in the omission to strike out these headings after the arrangement had made them useless, and before the manuscript was sent to press. The occurrence of such blemishes entirely destroys the possibility of perusing the book with any comfort.

In fact, the book is not meant to be perused, but merely to be consulted. Brevity in the statement of cases is studied to such a degree that often all attempt at grammar is abandoned, and the reader is left to put together, as best he may, the heap of nouns presented to him, and guess what sentence would be formed were these supplied with their proper complement of verbs and particles. This is illustrated by the passage we have cited below, on the subject of the poor relator; it would do very well for a marginal note (which perhaps it is—we abstain from looking), but we defy any man to read a book containing many such passages without a painful sensation of fatigue, or, by any attention, to make his own any considerable part of what he reads. In a word, Mr. Barry has successfully produced a read-

¹ At p. 319 we read a passage of great pathos:—"a poor relator required to give security for costs."

able book on a very dry subject. Mr. Cox has been equally successful in producing an entirely *unreadable* book.

The last book upon our list is Mr. Morgan's *Supplement* to the well-known edition of the "Chancery Acts and Orders," to which we have referred in a former page. This Supplement contains such additions to the last edition, as are rendered necessary by the statutes, orders, and decisions of more recent date; these are arranged in the same manner as in the previous editions, which are so well known that no description is necessary. The little book now before us consists of two parts, one containing "Addenda," bringing the notes of the second edition up to the latest date;¹ the other containing such Chancery statutes and orders as have appeared since the publication of the second edition, with notes, of such few cases upon them as are to be found in the reports. We hardly understand why the Trustees' and Mortgagees' Act is found here; for the reason given, that "it will be constantly referred to by the Chancery practitioner," seems to apply equally to many omitted Acts. Perhaps, however, the editor is right in aiming at convenience, even with the sacrifice of all principle.

The works of Mr. Barry and Mr. Morgan treat on the same subject in very different manners, and each is, in its own province, excellent. We hope that both gentlemen will continue to contribute to the literature of their profession, the necessities of which they have shown themselves to understand so well.

¹ The Advertisement to the "Supplement" is dated February 18, 1861, and it appeared soon after that date; yet it contains a reference to a case of *Williams v. Williams*, 9 W.R. 296, which was published on February 9, 1861.

ART. III.—THE CASE OF ANDERSON, THE FUGITIVE SLAVE.

The Application for the Writ of Habeas Corpus and Judgment considered ; by THOMAS TAPPING, of the Middle Temple.

THE application for the rule in Anderson's case has raised the most important point of colonial law that has occurred within modern times ; viz., whether the Queen, by her Court of Queen's Bench at Westminster, has power to issue her prerogative *Writ of Habeas Corpus ad subjiciendum* into Canada, in respect of a matter arising entirely within that province, and over which the Canadian courts have jurisdiction ?

The counsel for the applicants had to make out the affirmative of this very important question, and, in doing so, their argument would have been much more lucid, and better arranged, had it commenced with the most recent statute and authority, and worked chronologically back upon the older statutes and authorities, until all that was relevant had been exhausted, and all the observations necessary for the information of the court had been made. Such a course would have been not only in accordance with the practice of our best-trained and most eminent advocates, but have also had the paramount advantage of putting the court in possession of the latest judicial tests, whereby it could accurately ascertain the present legal value of the earlier cases.

But the argument addressed to the court in Anderson's case, was differently cast. It commenced with irrelevant authorities, nearly five hundred years old, about Calais, and, after discussing whether the English Court of Queen's Bench had power to issue a *certiorari* to Berwick, or a *habeas corpus* to Ireland, Guernsey, or Jersey, or other prerogative writs to the Isle of Man, and other British dependencies, this important case was left by counsel for the decision of the court. Not a single act of parliament either of the imperial parliament relating to Canada, or of the Canadian legislature, as to the constitution, juris-

diction, or procedure of its courts of justice, was cited; omissions the more remarkable as their citation would have saved the Court of Queen's Bench at Westminster a great deal of unnecessary doubt and difficulty, and prevented it from assuming a jurisdiction which, it is feared, will be not only opposed by the Canadians, but establish an evil precedent, and tend to unsettle the amicable relations which at present exist between this country and her North American possessions.

The argument had not, however, proceeded far before that very learned judge, Mr. Justice Hill, wishing to rightly direct it, called counsel's attention to the stats. 14 G. III. c. 83, "An Act for making more effectual provision for the Government of the Province of Quebec, in N. America," and the 81 G. III. c. 81, which divides the province of Quebec into Upper and Lower Canada; the citation of which by the learned judge, showed clearly that he wished to be informed how far recent statutory enactments had affected the jurisdiction of his court. But all the information he got from counsel was, "that the latter statute treated the province of Quebec, which comprehended both Upper and Lower Canada, as a colony and possession of the crown of England." Not a very profound observation, and certainly one not at all complimentary to the judge, who had the act of parliament before him.

After the customary pause that usually follows the answer of a judicial question, the counsel, still persevering with the original scheme of their argument, cited Watson's case, 9 A. & E. 731; Vattel's "Law of Nations," B. I. c. 18, p. 210; 2 P. W. 75; 8 Bac. Ab. 424, 5th Ed. tit. *Habeas Corpus*; Rex v. Cowle, 2 Burr. 834, 855; *Grotius de Jure Belli ac Pacis*, b. ii. c. 9; Rymer's *Fœd.*, vol. viii. p. 15, Lond. 1709, vol. iii, part iv. p. 135, Hague, 1740; Campbell v. Hall, Cowp. 204; and were about to proceed further, when another learned judge, Mr. Justice Crompton, with characteristic acuteness, broke in upon the argument, and called attention to the real point in the case, saying—"You must make out that this court has concurrent jurisdiction with the courts in Canada." Whereupon Cockburn, C. J., also observed—"You

must show that this court has the power of issuing the writ into a possession of the crown, in which there is not only an independent legislature but an independent judicature." To which the learned counsel replied by way of *petitio principii*, as follows :— "The fact that Canada has both a separate legislature and judicature makes no difference. The superior courts in England have a concurrent jurisdiction with the courts in Canada, as to issuing writs of *habeas corpus*;" and immediately referred to cases about the Isle of Man, *R. v. Crawford*, 13 Q. B. 613 ; the stat. 5 G. III. c. 26 ; *Carus Wilson's case*, 7 Q. B. 984 (about Jersey), *Dodd's case*, 2 De G. & J., 510, S. C. 4 Jur. n. s., 291 (also about Jersey), and in *ex parte Lees*, El. Bl. and El., 828, S. C. 5 Jur., n. s. 333 (about St. Helena, the writ being refused). At this juncture, Mr. Justice Hill, who, during the citation of the last-mentioned cases had evidently been pursuing a train of silent reasoning, remarked, "When writs of *habeas corpus* were issued to Ireland, there was an appeal from the courts there to this court;"¹ and Cockburn, C. J., immediately stated—"Lord Campbell seems to have had considerable doubt whether, in a case like the present, the writ of *habeas corpus* could be issued. He said (El. Bl. & El. 834, S. C., 5 Jur. n. s. 334)—'It was not at all explained in what manner our writs of error, *certiorari*, or *habeas corpus* could be enforced in such dependencies' "² and, after a few observations in reply from the learned counsel, the Chief Justice reiterated—"The question is, whether the issuing of this writ is not beyond the ambit of our jurisdiction, and whether the right of issuing the writ is not vested in another jurisdiction ; that is, in the courts of Canada." To this counsel made reply by erroneously informing the court, that—"The colonial courts in Canada are established by charter of the Crown, sanctioned by the Legislature, and further stated that the party (Anderson) was not in custody under the commitment of any court which had power to try him ; nor was the court asked to interfere with any judgment or

¹ The learned judge was quite correct. See *Fryer v. Bernard*, 2 P. Wms., 261, cited *post*, p. 49.

² See also *Brac. Lib.* 3 fol. 106, 107, par. 4 & 5, cited *post*, p. 57.

sentence of any court, but that the party (Anderson) was in custody under the warrant of a local magistrate." Cockburn C. J. having here observed—" *It is a serious question whether we should attempt to exercise a jurisdiction which we have no means of enforcing,*" the argument ended. The judges retired, and upon their return into court—

SIR A. COCKBURN, C. J., said,¹—"We have carefully considered this matter, and the result of our anxious deliberation is, that we think that the writ ought to issue. *We are sensible of the inconvenience which may result from the exercise of such a jurisdiction. We are also sensible that it may be thought inconsistent with that higher degree of colonial independence, both in legislation and judicature, which has been carried into effect in modern times with happy results.* At the same time, in establishing local legislative and judicial authority, the legislature of Great Britain has not gone so far as expressly to abrogate any jurisdiction which the courts in Westminster Hall possess, of issuing writs of *habeas corpus* to any part of her Majesty's dominions; and we find that that jurisdiction in these courts has been asserted from the earliest times, and exercised down to the most recent. We have it upon the authority of Lord Coke (2 Inst. 53), Lord Mansfield, Blackstone, and Bacon's abridgment, that these writs of *habeas corpus* have been and are to be issued into all the dominions of the crown of England, when it is suggested that one of the Queen's subjects is illegally imprisoned. And not only have we these authorities in the shape of *dicta* of eminent judges, and assertions of text writers, but we have the practical application of the doctrine in cases in very modern times. The more remarkable instances are where the writ was issued to the islands of Jersey, Man, and St. Helena. Finding, upon these authorities, that the power has been not only asserted, but carried into execution as matter of practice, even where an independent local legislature and judicature were established, *we think that nothing short of a legislative enactment, expressly depriving us of this jurisdiction, will warrant us in withholding the exercise of it when called upon to do so for the protection of the liberty of the subject.* It may be that the legislature has thought fit to leave a concurrent jurisdiction to be exercised by the superior courts of this country and by the colonial courts, as there is in this court and the other courts of Westminster Hall. We can only act on the authorities, and we felt that we should not be doing right, under the authority of the precedents cited, if we refused to issue this writ." *Rule granted.*

So far for the argument and judgment in this important case; and it is worth noting that, during the whole of the discussion, the

¹ We give the judgment *in extenso*, not only because it is a useful one to record, but because this article should not, for obvious reasons, go forth to the world without it.

learned judges, as we have above shown, endeavoured by every means to ascertain their court's jurisdiction; while the learned counsel for the applicants not only used bold assertion for argument, but also neglected to cite either the Imperial statute 3 & 4 Vict. 35, or the Colonial statutes 2 W. IV. c. 8, and 22 Vict. c. 10, which are, by necessary implication, opposed to the jurisdiction of the court of Queen's Bench at Westminster.

But, before proceeding to lay the last-mentioned statutes before the reader, it may be useful to shortly notice the *habeas corpus* acts, 31 Car. II. c. 2 and 56 G. III. c. 100; also to examine *seriatim* the nature and value of the above-mentioned cases, premising that counsel for the applicants frankly admitted during their argument, that *no instance could be found of a writ of habeas corpus ad subjiciendum going into Canada*, and that the court of Queen's Bench at Westminster had no power to send such a writ either to Scotland or to the Electorate, all which Lord Mansfield had stated in *Rex v. Cowle*.¹

"THE HABEAS CORPUS ACT" is the statute 31 Car. II. c. 2, which was passed in the year 1678, and by it the writ runs into *any County Palatine, the Cinque Ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey*, any law or usage to the contrary notwithstanding. Observe, no mention is made of Scotland, Ireland, the Plantations, the Colonies, or the Isle of Man.

The *habeas corpus* amendment act is the statute 56 G. III. c. 100, which was passed in the year 1816, and the territorial jurisdiction of that act is—*That part of Great Britain called England, dominion of Wales, or town of Berwick-upon-Tweed, or the isles of Jersey, Guernsey, or Man*. Again no mention is made of Scotland, Ireland, the Plantations, or the Colonies; but the Isle of Man is mentioned for the first time, because it had, about fifty-one years previously, by statute 5 G. III. c. 26, been vested inalienably in the crown.

¹ *Rex v. Cowle*.

² *Burr*. 834.

The reference to THE CALAIS WRIT, 8 Rym. Fœd. 15, although it gave Mr. Justice Blackburn an excellent opportunity of showing his intimate and ready knowledge of English history, yet, as an authority in Anderson's case, was altogether irrelevant and improper. Every body knows, or rather believes, that the unfortunate Duke of Gloucester, the subject of the writ, was kidnapped, secretly hurried to Calais, and confined there in a prison for treason, by the command of his king, and with the alleged assent of the Earls of Rutland, Kent, Huntingdon, Nottingham, and Salisbury, the Lord De Spencer, and Sir William Scrope, who afterwards presented to parliament their appeal against the duke; and, in order that such appeal should be heard, procured the issuing of a writ of *habeas corpus*, directed to the Earl Marshal of Calais, to bring the Duke to Westminster to answer the appeal. But that writ was, as Mr. Justice Crompton accurately remarked, not a *habeas corpus ad subjiciendum*, but a *habeas corpus ad respondendum*, i. e., a process of the crown to bring in the Duke to answer a charge. Such a writ *ad respondendum* is still among the *formulae* of the superior courts of Westminster, and in every-day use whenever the presence of a prisoner in court is necessary as a party litigant. The following is a copy of the Calais writ, which is given in order that it may be seen that it and the modern writ in Chit. *Practice Forms*, p. 725, are almost identical; and that if the former, so the latter should have been cited:—

DE HABENDO THOMAM DUCEM GLOUCESTRÆ AD PARLIAMENTUM.

A.D. 1397.

An. 31 R. 2.

Cl. 21 R. 2.

P. 1 m. 22.

Rex Carissimo Consanguineo suo. THOMÆ COMITI
MARESCALLO, CAPITANEO VILLÆ NOSTRÆ CALESII,
et ejus locum tenenti—Salutem.

Om̃,

Carissimus Frater noster, EDWARDUS COMES RUTLANDIÆ.

Dilectus Consanguineus noster, THOMAS COMES KANTIÆ.

Carissimus Frater noster, JOHANNES COMES HUNTINGDONIÆ.

Dilecti Consanguinei nostri, THOMAS COMES NOTTINGHAMIÆ.

JOHANNES COMES SOMERSETIÆ. JOHANNES COMES SARUM ET

THOMAS DOMINUS DE SPENCER, ac

Dilectus et fidelis noster, WILLIELMUS LE SCROP, Camerarius
noster,

Corum nobis, in presenti parlamento nostro, inter alios

appellaverint THOMAM DUCEM GLOUCESTRÆ in prisa nostra, sub custodia vestra, de mandato nostro, existentem, de diversis proditionibus, per ipsum et alios prædictos, contra nos, statum, coronam, et dignitatem nostram, factis et perpetratis.

IPSIQUE APPELLANTES appellum suum prædictum se optulerint, in parlamento nostro prædicto, secundum Legem et Consuetudinem, in regno nostro Angliæ hactenus usitatas, prosecuturi.

Nobis humiliter supplicando quatinus ipsum ducem ad respondendum sibi, SUPER APPELLO PRÆDICTO, coram nobis, in eodem parlamento nostro, corporaliter venire jubere velimus.

Nos,

Supplicationi prædictæ annuentes,

Vobis MANDAMUS firmiter injungentes, quodd præfatum Ducem CORAM NOBIS et CONCILIO NOSTRO IN PARLIAMENTO NOSTRO PRÆDICTO, cum omni festinatione quæ poteritis, salvò et securè venire facias, AD RESPONDENDUM PRÆFATIS APPELLANTIBUS, SUPER APPELLO SUO PRÆDICTO, secundum legem et consuetudinem prædictas, et ad faciendum ulterius et recipiendum quod, per NOS ET DICTUM CONCILIUM NOSTRUM, IN EODEM PARLIAMENTO NOSTRO, de eo tunc contigerit ordinari.

Et hoc nullatenus omittatis,

Et habeatis ibi hoc Breve.

Teste Rege apud Westmonasterium XXI. die Septembris,

Per ipsum Regem et Concilium in Parlamento.

The Calais writ being now before the reader, it is clear that there are three principal and decisive objections against its being quoted as an authority in favour of the rule in Anderson's case, viz.:—1st, It was a *hab. corp. ad resp.*, and not a *hab. corp. ad subj.* 2nd, It was a writ *per ipsum regem et concilium in parlamento*, and not a King's Bench writ, issued by the king's *Justiciarii Angliæ*. And, 3rd, It was part and parcel of one of the most unconstitutional, atrocious, and murderous transactions to be found in English history, and therefore should never have been referred to in support of a modern legal right.

In *Rex v. Cowle*, 2 Burr. 834 (1759), the argument arose on a rule to show cause why a writ of *supersedeas* should not issue to a *certiorari* directed to the Mayor of Berwick, to remove an indictment into the Court of Queen's Bench at Westminster. It was not a case of *habeas corpus ad subjiciendum*, and, if it had been, it would not have been an authority applicable to Anderson's case, as it arose in 1759, nearly one hundred and thirty years after the passing of the before-mentioned statute, 31 Car. II. c. 2, whereby the Court of Queen's Bench at Westminster was empowered to issue such a writ of *habeas* to Berwick, and fifteen

years before the passing of the above-mentioned imperial Statute, 14 G. III. c. 83, which recognised the Canadian Courts of Civil and Criminal Judicature. But notwithstanding this, the eminent Chief-Justice, Lord Mansfield, who delivered the judgment, uttered the following important passages, the latter of which define and explain the power and jurisdiction of his Court in granting the writ of *habeas corpus* to the Plantations. He said, "That writs not ministerially directed (sometimes called Prerogative Writs because they are supposed to issue on the part of the king), such as writs of mandamus, prohibition, *habeas corpus*, and certiorari, are restrained by no clause in the constitution given to Berwick. Upon a proper case they may issue to every dominion of the crown of England. We cannot send a *habeas corpus* to Scotland or to the Electorate. But to Ireland, the Isle of Man, the Plantations, to Guernsey and Jersey, we may—and formerly it lay to Calais. *But, notwithstanding the power which the Court have, yet where they cannot judge of the cause or give relief, they would not think proper to interpose. Therefore, upon imprisonments in Guernsey and Jersey, in Minorca, and in the Plantations, I have known complaints to the KING IN COUNCIL, and orders to bail or discharge. BUT I DO NOT REMEMBER AN APPLICATION FOR A WRIT OF HABEAS CORPUS. Yet cases have formerly happened of persons illegally sent from hence and detained there, where a writ of habeas corpus out of this Court would be the properest and most effectual remedy.*" So that, taking the whole of this case together, and not selecting isolated passages, it is claimed as an authority against, and not in support of, the power of the superior courts at Westminster, to issue a writ of *habeas corpus ad subjiciendum* to Canada.

In support of Lord Mansfield's opinion, we may here conveniently cite without comment the case of *Fryer v. Bernard*, 2 P. Wms. p. 261, 262, M. T. 1724 (*not quoted in Anderson's case*), a sequestration case, in which it was held that, although the Court of Chancery in *England* might lawfully grant a sequestration against a defendant in *Ireland*, because the courts of justice here had a superintendent power over those in *Ireland*, and therefore

that writs of error lay in B. R. in England to reverse judgments in B. R. in Ireland; yet that the High Court in Chancery in England could *not* legally grant a sequestration to the governor of *North Carolina, or any other of the Plantations*, because Plantation appeals were to the king in council, and not to the High Court of Chancery in England. The Lord Chancellor, Lord Macclesfield, in giving judgment, said—"But as to the sequestration to be directed to the governor of North Carolina, or any other of the plantations, the court doubted much whether such sequestration should not be directed by *the king in council, where alone an appeal lies from the decrees in the Plantations*. For which reason it seemed, that in such cases the planter ought to make *his application to the king in council, and not to this court.*"

The two cases, i. e., *Carus Wilson's Case*, 7 Q. B. 984 (1845), and *Dodd's Case*, 2 De G. & Jones, 510, S. C. 5 Jar. n. s. 333 (1857), in each of which it was held that a *habeas corpus ad subjiciendum* issued by an English court could run in *Jersey*, may be conveniently considered together, as both admit of the same answer—namely, that each of them was decided after the passing of the statutes 31 Car. II. c. 2, and 56 G. III. c. 100, which expressly enact that Jersey shall be subject to the English writ. These cases were, therefore, not in point for the applicant.

Crawford's Case, 13 Q. B. 613, was decided in the year 1849, and, although it was referred to by the learned counsel for the applicant, its relevancy is not apparent. It was an application for a *habeas corpus ad subjiciendum*, to be directed to the governor of the Isle of Man. This island was purchased by the crown in 1765, and the purchase confirmed by statute 5 G. III. cc. 26 & 29, whereby the whole of the island and some of its dependencies were inalienably vested in the crown, and became subject to the jurisdiction of the superior courts at Westminster, facts which seem to have been the ground for the court's decision; for, on referring to the report of the case, we find the following marginal note, which is borne out by the judgment:—*Semble*. "That a writ of *habeas corpus ad subjiciendum* runs to the Isle of Man, at any rate since the statute 5 G. III. c. 26, by which the island

is vested inalienably in the king and his successors ;” and accordingly we find that, though the power of the superior courts at Westminster, to issue their writ of *habeas* into the island, was not given by the previously passed *habeas corpus* act, 31 Car. II. c. 2, yet we also find that it was expressly given by the subsequently passed statute, 56 G. III. c. 100.

It is difficult to ascertain the object for which the case of *ex parte Lees*, El. Bl. and El. p. 828, S. C. 5 Jur. n. s. 334 (1858), was cited by the counsel for the applicants. It was not a Canadian case, and the learned chief-justice, Lord Campbell, in refusing the rule prayed for, gave utterance to the following expressions as to the doubtful jurisdiction of his court:—“ This was an application for a rule for a writ of error, or for a certiorari, or for a writ of *habeas corpus*, for the purpose of quashing a conviction of the supreme court of the island of St. Helena. Some old precedents of writs issued out of this court to the French dominions of our early English sovereigns were cited to show that such writs might lawfully issue. No precedent, however, of any such proceeding, with respect to a dependency like St. Helena, was brought before us ; and it was not at all explained in what manner our writs of error, certiorari, or *habeas corpus*, could be enforced in such dependencies.”¹

As to *Campbell v. Hall*, Cowp. 204 (1774), it was an action for money had and received against a customs collectors of Grenada—not a *habeas corpus* case, and therefore inapplicable to Anderson’s case. The references to Vattel’s “ Law of Nations,” *Grotius de Jure Belli ac Pacis*, and the memorandum in 2 P. Wms. 75, refer to the rights of a conquering prince over a conquered state, immediately upon subjugation, and consequently are irrelevant to the kindly relations which exist between the mother-country and Canada ; especially now that the latter has a legislature and judicature of its own. In Watson’s case, 9 A. & E. 781 (1839), though the prisoners, the subject of the *habeas corpus*, were brought from Canada, yet they were in Liverpool (England)

¹ This is the true test of jurisdiction, as is shown by Bracton, lib. iii. fol. 106, 107, par. 4 & 5, *post*, p. 57.

when the writ was granted, to which place, as part and parcel of England, the Court of Queen's Bench at Westminster had clearly power to issue its writ of *habeas corpus*. Beside, since this case was adjudged, the colony of Canada has had an independent judicature, and special privileges conferred upon it by the Imp. Stat. 3 & 4. V. c. 35.; to which reference will be made hereafter.

We now proceed to demonstrate that the negative of the question stated in the first paragraph of this article is the correct one, and that the issue of the writ of *habeas corpus* by the Court of Queen's Bench at Westminster, was an act quite beyond either its common law or statutory jurisdiction.

As the common law jurisdiction of the Court is inapplicable to a colony which we have not possessed for three generations, no further comment is necessary on this head.

Our observations as to the statutory jurisdiction will be arranged under two principal heads. 1st, As to the topical jurisdiction of the Court of Queen's Bench at Westminster; and, 2ndly, As to the privileges and territorial ambit of the Canadian courts of civil judicature.

1st.—*As to the topical jurisdiction of the Court of Queen's Bench at Westminster.* That the Court of Queen's Bench at Westminster has a well-defined territorial jurisdiction, which it cannot legally transgress, is clearly shown as well by the appointments and patents of its judges, as by the course of its practice for a long series of years.

The head of the Court of Queen's Bench at Westminster,¹ is a functionary whose formal title formerly was that of *Justicia-*

¹ "The Chief-Justice of the King's Bench is not now that *Justiciarius Angliæ* which was anciently in use; for he had, in effect, all jurisdiction both in civil and criminal matters in the King's Bench, Chancery, Common-Pleas, and Exchequer, and often sat in those courts as their chief judge. But the chief-justice of the King's Bench has, as one of the judges of such court, that part of the jurisdiction of the *Justiciarius Angliæ* which concerns criminal causes, and the inspection and reformation of the judgments of other courts. It is true he is frequently called Chief-Justice of England, because he presides in that court where the *Justiciarius Angliæ* did most frequently and naturally sit, as the king's deputy in the administration of justice. But it is a misconception that therefore he is that *Magnus Justiciarius Angliæ*, the great state officer before the time of Henry III. He is created by writ, and always was; but the *Justiciarius Angliæ* by patent."—2 Hale's "Pleas of the Crown," p. 6.

rius Angliæ, and his court being a remnant of the ancient *aula regis*, can still be removed by the queen to any place in *England*, wherever she may, for the time being, happen to be ; and for this reason it is that the process of such court may be still made returnable, as formerly it always was, "*Ubicunque fuerimus in Anglia.*"

It may be argued, and with some plausibility, that the official name of the chief-justice, though confined to *England*, does not limit the jurisdiction of his court to this island, because it may well be that though his court must be held in *England*, yet its writs may lawfully run into the colonies or other dominions of her majesty. But, when the matter comes to be fairly considered upon authorities and usage, it will be found that the chief-justices of the Court of Queen's Bench in *England* have so constantly refused (except where specially authorized by statute) to accept jurisdiction over a local action arising, or crime committed, out of *England*, that the jurisdiction of the court is practically and actually coextensive with its judges' patents.

The nature and extent of the topical jurisdiction of the Court of Queen's Bench at Westminster may therefore be defined to embrace *England*, *Wales*, and *Berwick-upon-Tweed*, but not *Scotland* nor *Ireland*. The *Isle of Man*, and the *Islands of Jersey*, *Guernsey*, *Alderney*, and *Sark* are also excluded. Here the ordinary process of the Courts at Westminster has no force, and no action of a local character arising therein can be brought in the courts of this country. The colonies are also excluded, as is shown by the case of *R. v. Hooker*, 7 Mod. 193 (7 Geo. II., K. B. cor. Lord Hardwicke C. J., and Page, Probyn, and Lee, J.J.), in which a motion for an information for an assault and battery, committed on a person in *Newfoundland*, was refused on the ground that the offence was local, and that the procedure by information was not distinguishable, so far as related to the court's jurisdiction, from an indictment. Further, in *Doulson v. Matthews*, 4 T. R., 503, Lord Kenyon and Buller J. expressly held that trespass would not lie in the superior courts at Westminster for entering a house in *CANADA*. The latter judge saying—"We may try actions here which are in their nature transitory, though

arising out of a transaction abroad, but not such as are in their nature local." These authorities are, it is submitted, conclusively against the jurisdiction of the English courts.

We now proceed to notice several acts of parliament which have been from time to time passed, in order to enlarge not only the jurisdiction and process of the superior courts at Westminster, but also the powers of their judges and other officers, which, but for the such enabling statutes, could not have been legally exercised; and it appears that it has only been after centuries of struggles, that the Court of Queen's Bench at Westminster has at last established its jurisdiction over the whole of England proper. The first we propose to notice is the Stat. 11 Geo. IV. & 1 W. IV. c. 70; which was passed in order to give currency to Westminster writs within the county Palatine of Chester and in Wales, which it does in language that clearly shows that Queen's Bench writs were previously limited to England. Thus, sect. 13 enacts:—

That from and after the commencement of such Act, his Majesty's writ shall be directed and obeyed, and the jurisdiction of his Majesty's Courts of King's Bench, Common Pleas, and Exchequer, respectively, *and of the several judges and barons thereof*, shall extend and be exercised over and within the County of Chester, and the County of the City of Chester, and the several counties in Wales, in like manner, to the same extent, and to and for all intents and purposes whatsoever, as the jurisdiction of such courts respectively is now exercised *in and over the COUNTIES OF ENGLAND, not being Counties Palatine*, any statute heretofore passed to the contrary notwithstanding; and that all original writs to be issued into the said several Counties of Chester, City of Chester, and Wales, shall be issued by the cursitors for *London and Middlesex*, and the process and proceedings thereon shall be issued by and transacted with such of the officers of the several Courts of King's Bench and Common Pleas, as shall be named for that purpose by the chief-justices of such courts respectively, each naming for his own court.

So, when our relations with our East Indian possessions became considerable, it required the Stat. 13 Geo. III. c. 63, to empower the Court of Queen's Bench at Westminster to issue a *mandamus*, commanding the chief-justice and judges of the Indian courts to examine witnesses in India, and to render legal the use of such

examinations in the superior courts at Westminster, on the trial of misdemeanours or offences committed in India.

Further, the Stat. 1 W. IV. c. 22, after reciting that great difficulties and delays were often experienced, and sometimes a failure of justice took place in actions depending in courts of law, by reason of the want of a *competent power and authority* in the said courts to order and enforce the examination of witnesses when the same might be required before the trial of a cause; and after reciting the above-mentioned Stat., 13 Geo. III. c. 63, enacted by sect. 1st, That all and every the powers, authorities, provisions, and matters contained in such recited Act, relating to the examination of witnesses in India, should be, and the same were thereby, extended to all COLONIES, *Islands, Plantations, and places under the dominions of his Majesty in foreign parts.*

The 5th section provided—That every person whose attendance is required is entitled to the like conduct-money, and payment for expenses and loss of time, as upon attendance upon a trial; and the 6th section enacted—That any sheriff, gaoler, or other officer having the custody of any prisoner, may take such prisoner for examination, under the authority of this Act, by virtue of a writ of *habeas corpus*, to be issued for that purpose; which writ may and can be issued by any court or judge under such circumstances, and in such manner, as such court or judge might then by law issue the writ, commonly called the writ of *habeas corpus ad testificandum*.

Notwithstanding the passing of the last-mentioned Act, yet so jealously have the courts at Westminster respected their original jurisdiction, that when, in *Wainwright v. Bland*,¹ a *mandamus* was moved to examine a witness in *Scotland*, the court of K.B. refused the rule, and held that the witness must be examined by a commission, the court having no authority to issue a *mandamus* to *Scotland*, not being “foreign parts” within the above statute.

So it required the passing of the Stat. 45 Geo. III. c. 93, in order to provide for the appearance of persons to answer in cases where warrants were not usually issued, and to give evidence in criminal

¹ 1 Gale, 103. S. C. 3 Dowl. 653.

prosecutions in every part of the united kingdom. The second section of which Act enacted :—

That the service of every writ of subpoena or other process, upon any person in any one of the parts of the united kingdom, requiring the appearance of such person to answer or give evidence in any criminal prosecution in any other of the parts of the same, shall be as good and effectual in law as if the same had been served in that part of the united kingdom where the person so served is required to appear ; and in case such person so served shall not appear according to the exigence of such writ or process, it shall be lawful for the court out of which the same issued, upon proof made of the service thereof to the satisfaction of the said court, to transmit a certificate of such default under the seal of the same court, or under the hand of one of the judges or justices of the same, *to the Court of King's Bench in England*, in case such service was had in England ; or, in case such service was had in Scotland, to the Court of Justiciary in Scotland ; or, in case such service was had in Ireland, to the Court of King's Bench in Ireland ; and the said last-mentioned courts respectively shall and may thereupon proceed against and punish the person so having made default, in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpoena, or other process issued out of such last-mentioned courts respectively.

And the 4th section provided and enacted—That none of such last-mentioned courts shall in any case proceed against or punish any person for having made default, by not appearing to give evidence in obedience to any writ of subpoena, or other process, for that purpose, unless it shall be made to appear to such court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpoena or other process was served upon such person.

So the Statute 17 & 18 V. c. 34, after reciting that great inconvenience arose in the administration of justice, from the want of a power in the superior courts of law to compel the attendance of witnesses resident in one part of the United Kingdom at a trial in another part, and that the examination of such witnesses by commission was not in all cases a sufficient remedy for such inconvenience, enacted by sect. 1 :—

That if in any action or suit now, or at any time hereafter, depending in any of Her Majesty's superior courts of Common Law at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, it shall appear to the court in which such action is pending, or, if such court is not sitting, to any judge of any of the said courts respectively, that it is proper to compel the personal attendance at any trial of any

witness who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ, called a Writ of Subpœna *ad testificandum*, or of Subpœna *duces tecum*, or Warrant of Citation, shall issue in special form, commanding such witness to attend such trial wherever he shall be within the United Kingdom; and the service of any such writ or process *in any part of the United Kingdom*, shall be as valid and effectual to all intents and purposes, as if the same had been *served within the jurisdiction of the court from which it issues*. By sect. 4, persons are not to be punished for disobedience if sufficient money has not been tendered for expenses.

These statutes it must be admitted, when fairly considered, show that the topical jurisdiction of the Court of Queen's Bench at Westminster is coextensive with England proper, and not beyond, and that the authority and powers of its judges are limited by such jurisdiction, except where expressly enlarged by statute. But whether a court has or not jurisdiction in any given case, can readily be known by the following simple test, viz.—By ascertaining whether, if the jurisdiction were assumed and denied by the subject, such court could legally enforce its judgment by execution; for it is a legal axiom on this subject, that the power of enjoining its decision is a consequence of jurisdiction, and thus that jurisdiction and execution are convertible terms. This axiom is acknowledged by Lord Campbell in *ex parte Lees* El. Bl. & El. p. 834, where he said—"It was not at all explained in what manner our writs of error, certiorari, or *habeas corpus* could be enforced in such dependencies," which passage was, as we have seen, quoted with approbation by Chief Justice Cockburn in *Anderson's case*. This test is also laid down and descanted upon in a learned and accurate treatise, known to the profession as "*Moseley on Inferior Courts*," in p. 64 of which is the following paragraph:—

So a power of enjoining its decision is a necessary adjunct to a jurisdiction, and therefore it is said by Bracton¹—"Oportet etiam quod ille qui judicat, ad hoc quod rata sint judicia, habeat jurisdictionem ordinariam vel delegatam, et non sufficit quod jurisdictionem habeat, nisi habeat coercionem, quod si judicium suum executioni demandare non posset, sic essent judicia delusoria." Also—"Sunt enim causæ spirituales, in quibus judex secularis non habet cognitionem nec

¹ Lib. iii. f. 106, 107, par. 4.

executionem, CUM NON HABEAT COERTIONEM;"¹ and so strongly is a jurisdiction dependent upon a power and authority of giving it effect, that if a jurisdiction be created by act of parliament, or letters patent, and no mention made of such powers as are necessary for giving it effect, as a power of issuing process and execution, they will be implied by mere operation of law.

2nd.—*As to the privileges and territorial ambit of the Canadian Courts of Civil Judicature.*—The first statute to which attention is directed is the imperial Statute of 3 & 4 V. c. 35, which was passed on the 30th July, 1840, and is entitled, "An Act to reunite the provinces of Upper and Lower Canada, and for the government of Canada." It recites that it is necessary that provision be made for the good government of the provinces of Upper Canada and Lower Canada in such manner as may secure the *rights and liberties*, and promote the interests, of all classes of her Majesty's subjects within the same; and that it is expedient that the said provinces be reunited, and form one province for the *purposes of executive government* and legislation.

This statute, after declaring the union of the provinces, provides a legislative council and assembly, appoints a governor with very large powers, and by section 44, which establishes Courts of Appeal, Queen's Bench, and Chancery, in and for Upper Canada.²

After reciting "that, by the laws then in force in Upper Canada, the governor, lieutenant-governor, or person administering the government thereof, or the chief justice thereof, together with any two or more of the members of the Executive Council thereof, constituted and were a *Court of Appeal* for hearing and determining all appeals from such judgments or sentences as might lawfully be brought before them. And also, that by a legislative act of Upper Canada, stat. 2 W. IV. c. 8, entitled, 'An Act respecting the time and place of sitting of the Court of King's Bench,' it was amongst other things enacted, that his Majesty's Court of King's Bench in that province should be holden in a place certain, that is, in the city, town, or place which should be, for the time being, the seat of the civil government of such province, or within one mile therefrom. And also reciting, that by a Legislative Act of Upper Canada, passed in 7 W. IV. c. 2, entitled 'An Act to establish a Court of Chancery in this province,' it was enacted

¹ Lib. iii. f. 106, 107, par. 5.

² As Anderson escaped to Upper Canada, we need not trouble ourselves with the courts of Lower Canada. Other courts are also established by this statute, but for our purpose it is unnecessary to detail them.

that there should be constituted and established a Court of Chancery, to be called and known by the name and style of 'The Court of Chancery for the province of Upper Canada,' of which court the governor, lieutenant-governor, or person administering the government of such province, should be Chancellor; and which court, it was also enacted, should be holden at the seat of government in the said province, or in such other place as should be appointed by proclamation of the governor, lieutenant-governor, or person administering the government thereof."

And it was enacted, that until otherwise provided for¹ by an act of the Canadian legislature, all judicial and ministerial authority which before and at the time of the passing of the said Act, 3 & 4. Vic. c. 35, was vested in, or might be exercised by the governor, lieutenant-governor, or person administering the government of the said province of Upper Canada, or the members, or any number of the members of the executive council of the same province, should be vested in, and might be exercised by the governor, lieutenant governor, or person administering the government of Canada, and in the members, or the like number of the members of the executive council of such province respectively.

And that, until otherwise provided for² by act or acts of the Canadian legislature, the said Court of King's Bench, now called the Court of Queen's Bench of Upper Canada, should, from and after the union, be holden in the city of Toronto, or within one mile from the municipal boundary of such city. Provided always, that until otherwise provided by act or acts as aforesaid, the governor of Canada might, by and with the advice and counsel of the Executive Council of such province, by his proclamation fix and appoint such other place as he might think fit, within that part of the last-mentioned province which then constituted the province of Upper Canada, for the holding of the said Court of Queen's Bench.³

¹ This section is superseded by the provincial act, 12 Vic. c. 63, and other acts, making other provision for the same matters.

² See *ante*, p. 44, and *post*, p. 60.

³ The 47th section of the same Act enacts—"That all the courts of civil and criminal jurisdiction, within the provinces of Upper and Lower Canada, at the time of the union of the said provinces, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, or ministerial, within the said provinces respectively, except in so far as the same may be abolished, altered,

The second Statute to which attention is directed was passed in the year 1859 (22 Vic. c. 10), and is entitled, an Act respecting the superior courts of civil and criminal jurisdiction; and by it her Majesty, by and with the advice and consent of the legislative council and assembly of Canada, enacted as follows—

By Section I., “Her Majesty’s Court of Queen’s Bench for Upper Canada, and the Court of Common Pleas for Upper Canada, are to continue under the names aforesaid; and all commissions, rules, orders, and regulations granted or made in, by, or respecting such courts, or the judges or officers thereof, existing and in force when such Act took effect, remain in force until altered or rescinded, or otherwise determined.”

By Section II., “Such Courts of Queen’s Bench, &c., are, during the reign of a king, to be called ‘*His Majesty’s Court of King’s Bench for Upper Canada*’ and during the reign of a queen, ‘*Her Majesty’s Court of Queen’s Bench for Upper Canada*.’”

By Section III., “Such courts are Courts of Record of original and co-ordinate jurisdiction, and respectively possess all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction; and have and shall use and exercise all the rights, incidents, and privileges of a court of record, and all other rights, incidents, and privileges, as fully, to all intents and purposes, as the same were, at the time such Act took effect, used, exercised, and enjoyed by any of her Majesty’s superior courts of common law at Westminster in England, and may and shall hold plea in all, and all manner of actions, causes, and suits, as well criminal as civil, real, personal, and mixed, and proceed in such actions, causes and suits, by such process and course as are provided by law, and as shall tend with justice and despatch to determine the same; and may and shall hear and determine all issues of law, and also hear, and (except in cases otherwise provided for) by and with an inquest or varied by, or may be inconsistent with the provisions of this act, or shall be abolished, altered, or varied, by any act or acts of the legislature of the province of Canada, shall continue to subsist within those parts of the province of Canada which now constitute the said two provinces respectively, in the same form and with the same effect as if this act had not been made, and as if the said two provinces had not been reunited as aforesaid.”

of twelve good and lawful men determine, all issues of fact that may be joined in any such action, cause, or suit, and judgment thereon give, and execution thereof award, in as full and ample a manner as, at the time this Act takes effect, can or may be done in Her Majesty's Courts of Queen's Bench, Common Pleas, or in matters which regard the queen's revenue (including the condemnation of contraband or smuggled goods), by the Court of Exchequer in England."

By Section IV., "The aforesaid courts are to be held at the *City of Toronto*."

By Section V., "Such Court of Queen's Bench shall be presided over by the chief justice of Upper Canada and two puisne justices, and such Court of Common Pleas by a chief justice and two puisne justices; and such courts respectively may be holden by any one or more of the judges thereof, in the absence of the others; and the chief justice and justices of the said courts respectively has, and may use and exercise all the rights, incidents, and privileges of a judge of a Court of Record, and all other rights, incidents, and privileges, as fully, to all intents and purposes, as the same were, at the time such Act took effect, used, exercised, or enjoyed by any of the judges of any of Her Majesty's superior Courts of Common Law at Westminster."

As, therefore, her Majesty's Court of Queen's Bench in Canada has jurisdiction over the same subject-matters as its sister court in England, so the former court is, as regards Canada, intrusted with the highest jurisdiction; not only over all capital offences, but also all other misdemeanours whatsoever of a public nature, tending either to a breach of the peace, the oppression of the subject, the raising of factions, controversy, or debate, or to any matter of misgovernment. So that, whatever crime is manifestly against the public good comes within its cognizance, and this though no person is directly injured. *Neither can any private subject, who has not forfeited his right to the protection of the law, suffer any kind of unlawful violence or gross injustice against his person, liberty, or possessions, from any person whomsoever, without a proper remedy from this court; not only for satisfaction of the*

private damage, but also for the exemplary punishment of the offender.¹

Neither is it necessary, in a prosecution for any such offence in the Canadian court, to shew a precedent of the like crime formerly punished there, agreeing with the present in all its circumstances; for such court, like the Court of Queen's Bench at Westminster, being the *custos morum* of all subjects in Canada, whenever it meets with an offence contrary to the first principles of common justice, and of dangerous consequence to the public if not restrained, may and will adopt such a punishment as the heinousness of the offence requires.

The above Acts of Parliament, although they do not in terms exclude the jurisdiction of the Court of Queen's Bench in England, yet, as such court never had any common law jurisdiction over Canada, and as there is no statute conferring upon such court the power of sending its prerogative writs into that colony, the necessity for expressly excluding the jurisdiction of the English courts did not arise. Indeed, had such statutes contained language restraining the jurisdiction of the English courts, the fact might have afforded a plausible ground for asserting that the jurisdiction once existed, although in truth it never has.

More could be stated on this important and interesting subject, was there space for so doing; but sufficient has been alleged to convince any impartial mind, that neither the common law, nor the present topical jurisdiction of the English Court of Queen's Bench at Westminster, ever extended, or now extends to Canada (except as to those matters specially given to it by statute); and that, as there is no statutory power whereby the English court is enabled to grant a *hab. corp. ad subj.* into that colony, so the writ in Anderson's case should not have been granted.

It has also been demonstrated that, as the lives and liberties of her Majesty's subjects in Canada are protected by her Majesty's courts there, having powers equally extensive, ample, and powerful as those enjoyed by the Court of B. R. in England, so the latter court has acted improvidently in usurping a jurisdic-

¹ 2 Hawkins' "Pleas of the Crown," p. 7.

tion which is the privilege of the Canadian courts, and of the Canadian courts alone. Such usurpation may, indeed, in the present instance, be attempted to be palliated by the extreme and urgent circumstances of Anderson's case; but this is undeniable, that a prerogative writ tested in England, and issued by the Court of B. R. here, has been sent for execution on to American soil; that Canadian privileges have been violated; and that a dangerous and alarming precedent has been established, which sooner or later may be made the stepping-stone for further encroachments, and may ultimately lead to a collision between the judicatures of this country and our North American possessions, to end, probably, with a second declaration of American independence.

NOTE.—Since the above article has come into our hands, the UPPER CANADA LAW JOURNAL has reached us, and we there find an able paper, which in many points corroborates the view of Mr. Tapping. We think it will be interesting to our readers to see how the writer in a colonial journal treats the subject. Our very excellent contemporary will, therefore, excuse us when we extract, *in extenso*, his review of a case which, so far as the credit of the Court at Westminster is concerned, is, we are compelled to consider, a very unfortunate one.—ED.

THE ENGLISH WRIT OF HABEAS CORPUS.

JOHN ANDERSON, the negro, arrested under the provisions of the Ashburton Treaty, and the Provincial Statute passed to give effect to that treaty, and recently discharged by our Court of Common Pleas, upon the ground of defects in the warrant of commitment under which he was arrested, is reported to have said, when discharged, "That he never thought there was so much law in Canada as he had experienced."

The remark, though bluntly put, is indicative of the many vexed questions to which the arrest, detention, and subsequent discharge of this man gave rise. From the day of his arrest till the day of his remand by the Court of Queen's Bench, in Upper Canada, much doubt was entertained as to the proper construction of the provisions of the treaty and statute under which he was arrested, and by virtue of which he was detained in custody. From the day of his remand by our Court of Queen's Bench till the day of his discharge by our Court of Common Pleas, there was a continued ferment throughout the Province. That ferment was not lessened by a knowledge of the fact, that the Court of Queen's Bench in England had presumed to exercise a jurisdiction in Canada opposed to every principle of legislative independence, judicial

independence, and of self-government. Though divided, as our people were, in the construction of the Ashburton Treaty, all united in the opinion that the English Court, in sending a writ of *habeas corpus ad subjiciendum* to Canada, had done wrong. Men, legal and lay, joined in the condemnation of the proceeding, as being one calculated only to sting us in the most sensitive part of our body corporate—our national pride. Men of all politics, conservative and reform, ministerial and opposition, pronounced the act of the English Court both high-handed and unfounded. Birth was given to a feeling of resistance which will not in all probability slumber till the assumed jurisdiction of the English Court is tested and defeated on national grounds.

When, however, we speak of a feeling of resistance, we do not desire to depict overt acts of treason ; we do not intend to indorse the absurd stories circulated in the neighbouring States about "the rising of 1775." Such stories were a libel on our loyalty. While determined to resist encroachments on our rights as an independent colony by all constitutional means, there never was, nor is there, the slightest intention to kindle the flame of rebellion.

Men argue that if an English Court can command *our* Sheriffs to obey writs of *habeas corpus*, why not writs of execution and other process of a similar kind ? They ask themselves, where is to be the limit ? Who is to define it ? There was a time when Colonial Sheriffs and other public officers were appointed in England, under the great seal of England, and imposed upon us whether we liked them or not. That time is passed. Then our Sheriffs were English officers appointed by English authority. Then English Courts might have attempted to issue writs to Canada without much murmur ; but now, when, in the enjoyment of powers of self-government, we appoint our own officers by our own provincial seal, and dismiss them when we please, the exercise of such a jurisdiction grates upon our ears.

But the fact that the exercise of the jurisdiction is distasteful, is no argument against the existence of the jurisdiction itself, but rather against the exercise of it. Does the jurisdiction in fact exist ? If it does, was it rightly and discreetly exercised in the case of Anderson ? These are questions, to the solution of which we are about to apply our mind.

The writ issued was a *habeas corpus*, the right to which is one of the great bulwarks of the liberty of a British subject. So long as the *right* to that writ exists, so long must liberty in Britain be more than a name. The right is only suspended under circumstances of great national peril. The writ is described by Blackstone as a high prerogative writ, running into all parts of the King's dominions. The reason he assigns is, that the King is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted.—(3 Black. Com. p. 131.) But is not the Queen as much present in the Superior Courts in Toronto as she is in the Superior Courts in London ? And if she, a body corporate, receives the information as to the cause of the detention in custody of her subject in Toronto, is it necessary for her once more to hear the same story in London ? The presence of the Queen in her Courts at Westminster is

a legal fiction. She is as much present in her Courts at Toronto as in Westminster. When we speak of the Queen we do not mean Victoria, we mean the Crown—the body corporate of that name. In England, the Crown has its great seal. In Canada, the same Crown has a different seal. We therefore see that though the Crown acts in Canada as well as in England, the machinery of its action is not in Canada *the same* as in England.

When we presume to question the jurisdiction of an English court of justice to issue a writ of *habeas corpus* to a Sheriff in Canada, we do not attempt to dispute the *right* of a British subject to the writ. Sir William Blackstone does not say that a writ of *habeas corpus* issued by the Court of Queen's Bench in *England* runs into all parts of Her Majesty's dominions; but simply that the writ, which may be issued in any part of Her Majesty's dominions where there is proper machinery for the purpose, runs into all parts of the jurisdiction that issues it. If he intended more, his remarks, made a century since, at a time when colonial independence was unknown, must be read with much qualification as applied to modern times. There is a great distinction between "the plantation" of his time, when a British subject in London could, by an affidavit made in London, have execution against his debtor in a Colony, and our time, when the Colony makes its own laws, has its own courts, and is substantially an independent power. The idea of such a Colony never occurred to the great commentator, and, had it, he would have entertained the idea only to smile at its supposed absurdity or impracticability.

The writ of *habeas corpus ad subjiciendum* may derive its existence when issued from one of three sources—the Common Law, the statute 31 Car. II. c. 2 (passed in 1677), or the statute 56 Geo. III. c. 100 (passed in 1816); and its effect when issued will in some degree depend upon the source of its existence.

The writ is very seldom, if ever, issued at common law. When issued under the statute law it is much more effective, and therefore it is generally issued under the 31 Car. II. c. 2. Of the extent of its operation at common law little is known, and that little is not at all satisfactory. Most of the expressions attributed to learned Judges in regard to its effect at common law will be found, when closely examined, to have reference to the writ under the statute of 31 Car. II. c. 2. One thing is clear. The object of the statute was not to diminish the effect of the common law writ, or the powers of the Courts in regard to it, but rather to make the writ more effective and to give increased powers to the Courts, so as to place the writ as nearly as possible within the reach of any person deprived of his liberty in any part of Her Majesty's dominions. We may therefore safely assume that the effect of the writ at common law, and the powers of the Courts in regard to it before the statute, were, if any thing, less than under the statute.

Then what is the effect of the writ under the first statute 31 Car. II. cap. 2, passed in 1677, and the jurisdiction of the English Courts under that statute? By sect. 11 of this act, it is expressly declared that "an *habeas corpus* may be directed and run into any county palatine, the cinque ports, or other privileged places within the kingdom of

England, dominion of Wales, or Town of Berwick-upon-Tweed, and the Islands of Jersey or Guernsey, any law or usage to the contrary notwithstanding."

If before this act a writ of *habeas corpus* issued in England would run into the privileged places named, the enactment is unnecessary. If therefore entitled to assume any thing, we must assume that before the enactment the English Courts had not the jurisdiction, and that the enactment was made to confer the jurisdiction. It is, by sect. 16 of the same act, provided, "that if any person or persons, at any time *resident in this realm*, shall have committed any capital offence in Scotland or Ireland, or any of the islands or foreign plantations of the King, his heirs or successors, where he or she *ought to be tried for such offence*, such person or persons may be sent to such place, *there to receive such trial*, in such manner *as the same might have been done before the making of this act*." Thus the legislature, so far from intending by this act to interfere with local courts or local jurisdiction in colonies or plantations, for the sake of precaution, expressly provided against any such interference; and went further, by declaring that even residents in England charged with capital offences committed in the plantations, instead of being tried by English Courts, should be sent to the Plantations, there to be tried. The distinction between English Courts and Colonial Courts is here expressly observed.

This tends to support the dictum of Lord Denman in the case of *Carus Wilson*, 7 Q. B. 984, to the effect that "a court within the Queen's dominions, exercising public authority, must be taken to be competent to judge of its own law"—a dictum mentioned with approbation in the more recent case of *Dodd*, 2 De G. & J. 510.

It does seem to us that, for the purposes of our inquiry, the Courts in England are as to England as much *local* as the Courts in Canada are as to Canada *local*, and that, where in each country there are Courts of superior jurisdiction, the assumption by the former of a territorial jurisdiction over the latter, for any purpose whatever, is as if the Courts of Canada were, in spite of the Courts in England, to assume a territorial jurisdiction over England; and we think that this view will be strengthened rather than weakened by a reference to authorities.

Before leaving the statute of Charles, we may as well mention that the "counties" mentioned in it are English counties, and therefore the jurisdiction intended to be exercised, except where otherwise provided, is a *local one*. By sect. 18, it is provided that, "to the intent that no person may avoid his trial at the assizes or general gaol delivery, by procuring his removal before the assizes, at such time as he cannot be brought back to receive his trial there, that after the assizes proclaimed for *that county* where the prisoner is detained no person shall be removed from the common gaol upon any *habeas corpus* granted in pursuance of this act, but upon any such *habeas corpus* shall be brought before the Judge in open court, who is thereupon to do what to justice shall appertain." Until lately there were no such divisions as "counties" in Canada, these divisions being almost peculiar to England, and this of itself would be one argument to show that the jurisdiction was restricted to England, where counties at the time of the passing of the

act did and do still exist. But look at the absurdity of attempting practically to apply the jurisdiction territorially to a colony like Canada ! The Court of Queen's Bench in England, without knowing any thing of the time when assizes are held in Canada, or whether assizes are in reality held here at all or not, grants a *habeas* to bring up the body of a man in gaol, accused of an indictable crime in Canada ! The answer might be that the assizes had been proclaimed for the county in which he is imprisoned, and therefore that he must be brought before *our* Judge of Assize. Our Sheriff might in fact be commanded at that very time to have the body before *our* Court of Assize. If he obeyed the English writ he would be punished by our Court for disobeying their writ, and, if he obeyed our writ, ought for the same reason to be punished by the English Court for disobeying theirs. Between two fires the Sheriff would be distracted, and his usefulness as an executive officer of our courts, to whom *alone* he is responsible for his conduct, be seriously impaired. His duty is to obey the mandates of our courts, no matter what the consequence in relation to foreign courts. And yet by sect. 5 of the statute of Car. II. the act of obedience to the mandates of our courts, which might be in effect a disobedience of the mandates of the English courts, would under certain circumstances, if the English writ were to have any operation in Canada, render the Sheriff "incapable to hold or to exercise his office." In other words, the performance by a Canadian Sheriff of his duty towards the Canadian Courts, might have the effect in England of rendering him incapable of further holding or exercising his office—an office conferred upon him by colonial authority, and the duties of which he had properly discharged according to the laws of Canada !

The only way of preventing such a conflict is to read the statute as giving to English Courts local jurisdiction in England, and to Canadian Courts local jurisdiction in Canada ; and this seems to us to be its true construction.

Next, as to the third source of a *habeas corpus*, 56 Geo. III. c. 100, passed on 1st July, 1816. In this act the Colonies are not named. It cannot therefore, according to well understood legal principles, have any force whatever in the Colonies. We may however look at it, in order to see how far the English Legislature designed English Courts to have more than local jurisdiction. By the first section, it is enacted "That where any person shall be confined or restrained of his or her liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit), within that part of Great Britain called England, dominion of Wales, or town of Berwick-upon-Tweed, or the isles of Jersey, Guernsey, or *Man* (for the first time mentioned), it shall and may be lawful for any one of the Barons of the Exchequer, of the degree of the coif, as well as for any one of the Justices of one Bench or the other; *and where any person shall be so confined in Ireland*, it shall and may be lawful for any one of the Barons of the Exchequer; or of the Justices of the one Bench or the other, *in Ireland*, and they are hereby required, upon complaint, &c."

By the previous act (31 Car. II. c. 2) it was declared that the writ issued in England might run into "any county palatine, the cinque"

ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey," but no mention was made either of the Isle of Man or of Ireland. The Isle of Man having, in the mean time, been by Act of the Legislature 5 Geo. III. cap. 26, expressly annexed to England, extended operation was given to the writ; but as to Ireland, though in the words of Sir William Blackstone, a part "of the Queen's dominions," still, having Superior Courts *of its own*, the power to issue the writ for Ireland was left to be exercised as before, by *its own courts*.

What, for the purpose of our inquiry, is the difference between Ireland and Canada? Each is governed by a Viceroy. In each, the Crown acts by deputy. Each has its Superior Courts of Law and Equity. One is as much subject to Imperial control as the other. In fact, Ireland is at the present time more under the direct dominion of the Crown than Canada. Canada has its own legislature. *Ireland has not*. Certainly there is more resemblance between Ireland and Canada than between Jersey and Canada—the Isle of Man and Canada—Calais and Canada—St. Helena and Canada? And yet English Courts hesitate not to exercise a jurisdiction *in Canada* which dare not be attempted *in Ireland*!

It is said that the laws of England and of Canada are identical. This is a mistake. The laws of Canada are no more identical with those of England than are the laws of Ireland identical with those of England. Ireland, before it came under British sway, was a distinct kingdom—a foreign dominion. Canada, before 1759, was a French colony—a foreign dominion—a dominion of the crown of France. When Ireland was, in 1801, brought under the direct dominion of England, the laws of Ireland were preserved. So when Canada was, in 1759, surrendered to the British, it was expressly stipulated that she should retain her former laws. It is true that the criminal laws of Canada resemble those of England; but the same thing may be said of the criminal laws of Ireland. When Canada, in 1792, was divided into two Provinces, Upper and Lower Canada, with independent legislative powers, it is true that the Legislature declared that in all matters of controversy relative to property and civil rights, resort should be had to the laws of England as the rule for the decision of the same; but it must be borne in mind that, since 1792, the legislature of Upper Canada and (now that the Provinces are re-united) of Canada have altered the laws of England as it existed in 1792, in an endless variety of ways. It must also be borne in mind that since that year England has also been altering her laws. Though in 1792 the laws of both countries, in relation to civil rights, were as nearly as possible identical, since that year England and Canada have been travelling in different directions—each making laws for the government of its own people, without any regard to the laws of the other. This remark applies with as much force to the criminal as to the civil laws of both countries. How then can it be said that, in 1861, the laws of the two countries are identical? They are in truth no more identical than are the laws of the State of New York and of England. And so far as the oneness of the laws is relied upon to give jurisdiction

for the issue of a writ of *habeas corpus*, the writ might as well go to the State of New York, or any other State of the Union, as come to Canada.

It is said, however, that the jurisdiction did once exist, and that it has not been taken away by the Legislature. Did it ever exist as regards Canada, or a colony in the situation of Canada? We deny that it ever did, and challenge the proof.

We are told that it lies to Jersey.—(Bac. Abr. Habeas Corpus, B. 2; Viner's Abr. Habeas Corpus, E. 2; Anon, 1 Ventris, 357; 2 Burr. 856; *Belson in re*, 7 Moo. P. C. 114; *In re Carus Wilson*, 7 Q. B. 984; *In re Brennan*, 10 Q. B. 492; *In re Dodd*, 4 Jur. N. S. 291.) What is the analogy between Jersey and Canada? It is true that Jersey is governed by laws and customs somewhat different from those of England. It is true that this island is not bound by an act of the English Parliament, unless particularly named in it. It is true that all causes are originally determined by their own officers, the bailiffs and jurats of the island. It is true that an appeal lies from them to the Queen and Council, as the last resort. But it is not equally true that as far back as 1677, and before any of the decisions above quoted, it was by Act of Parliament expressly enacted that the writ of *habeas corpus* issued by Courts in England should run to Jersey. Is there any such act of Parliament in relation to Canada? Is there, moreover, any comparison to be made between the circumstances of the Province of Canada, with its independent legislative government, and the Island of Jersey, governed by the ducal customs of Normandy?

We are told that the writ runs to the Isle of Man.—(*Ex parte Crawford*, 13 Q. B. 613.) Is there any analogy between Canada and the Isle of Man, which, in 1765, was purchased by England for £70,000? Is it not true that, by the statute 5 Geo. III. cap. 26, the whole island and all its dependencies was unalienably vested in the British crown, as an integral part of the British Empire? Is it not true that since (and not before) the Vesting Act, the English Legislature has provided for the issue of the writ of *habeas corpus* to the Isle of Man? Is it not true that the decision as to the Isle of Man was since the Vesting Act, and has express reference to it? Are there any such acts in relation to Canada? There are none. The comparison is not only void of analogy but ridiculous in its nature, viewed either from a legal or a national point of view.

We are told that the writ ran to Calais when in the possession of the British?—(Bac. Abr. Habeas Corpus, B. 2; Viner's Abr. Habeas Corpus, E. 2; Anon, 1 Ventris, 239; 2 Burr. 856.) Of this there is no satisfactory proof, nothing except dicta without foundation, and apparent precedents, about which little or nothing can be ascertained. But was Calais such a colony as Canada—a colony possessing independent legislative and judicial powers? The reference to the Calais precedents is of no weight, not only because we have no reliable report of them, but because there is no parallel between Calais in the fifteenth century and Canada in the nineteenth century. The comparison is absurd, and could never have been made by any person possessing the slightest knowledge of Canada, its constitution, its institutions, or its resources.

We are told that the writ runs to the Island of St. Helena. There is no authority for this assertion. The case cited (*Ex parte Lees*, 9 El. B. & El. 818) is no authority for the position. The writ of *habeas corpus* as well as *certiorari*, asked for in that case was refused. Lord Campbell, in giving judgment, said "This was an application for a writ of error or *certiorari*, to be directed to the Supreme Court of the Island of St. Helena, to bring before the Court of Queen's Bench in England the record of a conviction alleged to be erroneous. Some old precedents of writs issued out of this Court to the French dominions of our early Sovereigns were cited to show that the writs might lawfully issue. No precedent, however, of any such proceeding with respect to a dependency like St. Helena, for several centuries, was brought before us; and it was not at all explained in what manner our writs of error, *certiorari*, or *habeas corpus*, could be enforced in such dependencies. Without, however, deciding how far we might be empowered to issue such a writ we are clearly of opinion that we ought not to direct such a writ to issue in the present case."

England's colonies of the present day are not what her colonies were in the fifteenth and sixteenth centuries. Even as to the latter, however, we assert there is no satisfactory proof of the exercise of a jurisdiction such as was recently exercised with regard to Canada. The jurisdiction is one which in our belief never did exist, and for which in modern times at least there is no necessity. No case can be found of a writ of *habeas corpus* ever having issued from the English Courts to Canada, or to any other colony of independent legislature and independent judiciary. The jurisdiction appears to us to have been usurped in the Anderson case. The cases of the Isle of Man and Jersey, chiefly relied upon by the Court when ordering the issue of the writ, are, for reasons already mentioned, wholly inapplicable; and the case of St. Helena, so far as applicable, is an authority against the jurisdiction.

The exercise of the jurisdiction appears to us to have been the more extraordinary, if the right to exercise it had been undoubted, when it is considered that the Court was not under any obligation to issue the writ upon the materials before them.

Anderson, who, when escaping from slavery in the State of Missouri, was arrested under the laws of that State by one Digges, slew Digges and fled to Canada. His surrender as a fugitive from the criminal justice of Missouri was demanded of Canada. He contended that he was not guilty of "murder," within the meaning of that term as used in the Ashburton Treaty, which provides for the surrender of fugitives from justice, as between Great Britain and the United States. He appealed to the Court of Queen's Bench for Upper Canada, a court of superior jurisdiction in this colony, and his appeal failed. He was remanded under warrant of the Court to his former custody. His case was about to be appealed to the Court of Error and Appeal, or Supreme Court of Upper Canada. A cry of sympathy for an escaped slave is raised and is wafted across the Atlantic. The Secretary of an Anti-Slavery Society in London hears the cry, and, fired with zeal, hastens to make an affidavit in order to invoke the aid of an English

Court by writ of *habeas corpus*. He knows nothing of the facts, but still he must make an affidavit. He swears that Anderson is a British subject domiciled in Toronto. He swears that Anderson is illegally detained in the gaol of that city. He swears that Anderson has never been legally accused or charged with or legally tried or sentenced for the commission of any crime or of any offence against the laws in force in Canada. He swears that Anderson was not otherwise liable to be imprisoned or detained under or in virtue of any such laws. He also swears that, unless a peremptory writ is issued, the life of Anderson will be exposed to the greatest and to immediate danger. This was what might be called a pretty stiff affidavit. It was made by a man more than 3,000 miles distant from the place where all the occurrences about which he swore took place, but of which he had no personal knowledge. He, however, took good care to suppress facts in regard to the cause of Anderson's detention, about which, if he knew any thing of the case, he must have had some knowledge. With him, however, the end probably justified the means.

We say there was no obligation on the English Court of Queen's Bench to grant the writ on such materials. In the first place, the jurisdiction was, to say the least of it, doubtful. In the second place, the affidavit was not made by the prisoner himself, nor was it shown that he was so coerced as to be unable to make an affidavit—(See *In re Parker et al*, 5 M. & W. 32; *In re Carus Wilson*, 7 Q.B. 984.) In the third place, the affidavit, on its face, bore evidence of the fact that it was made by a man who appeared to be as reckless in taking an oath as he was unwarranted by the facts in making it. In the fourth place, the writ though of right is not of course—(*Hobhouse's case*, 3 B. & Ald. 420; *Ex parte Knight*, 2 M. & W. 106.)

The course that the Court should have adopted would have been to have issued a rule to show cause why the writ should not issue.—(*In re Crawford*, 13 Q. B. 613.) Had this course been adopted, the rule would certainly have been discharged, because of the deception practised by the applicant in fraudulently suppressing facts material to be known on the application for the rule.—(*Carus Wilson's case*, 7 Q. B. 1000.) Besides the right to the writ by a person in a colony is grounded on the fact that the person in custody is a British subject, and the affidavit which stated that Anderson was a British subject domiciled in Toronto was positively untrue. He was a foreigner domiciled in Upper Canada, but not a British subject. True it is that a foreigner, while in England, is entitled to the protection of English laws and to the English writ of *habeas corpus* (*case of Hottentot Venus*, 13 East. 195; *Canadian Prisoners*, 1 P. & D. 516; 9 A. & E. 731; S. O. *Ex parte Besset*, 6 Q. B. 481); but the reason urged by those who support the jurisdiction of an English Court to issue writs of *habeas corpus* beyond its local jurisdiction, is that the Queen "is entitled to have an account why the liberty of any of her subjects is restrained, wherever that restraint may be inflicted." So that in the affidavit produced to the English Court there was not only *suppressio veri* but *suggestio falsi*?

The remarks which we have made on this troublesome question do

not arise from any want of respect for the English Court of Queen's Bench. We hold that and the other English Courts of superior jurisdiction in much veneration. But we do regret the occasion which rendered necessary such remarks as we have made. It might have been easily avoided, and by not avoiding it the Court of Queen's Bench in England has established a precedent of which the Anti-Slavery Society in London will not be slow to avail itself whenever a fugitive to Canada from crime committed in the United States happens to be a coloured man. We do not advance an opinion on the vexed question whether Anderson did or did not commit the crime of murder within the intent and meaning of the Ashburton Treaty. But we do say that colour should be no immunity against punishment for crime. We know by experience that when a fugitive from the United States, accused of crime, happens to be a coloured man, nothing is more simple than to get up a cry of slave hunters, slave hounds, &c., and that no cry is more greedily seized in England than that same cry. It is just possible for men, in their zeal for the rights of the slave, to overlook the responsibility of the criminal and so beget results the reverse of beneficial to society, either in Canada or Great Britain.

We yield to none in sympathy for the slave. We abhor that system. We deplore its consequences. But while we sympathise with the slave, while we abhor slavery, while we deplore its consequences, we cannot close our eyes to the fact that the recent action of the Court of Queen's Bench in England was alike disrespectful to the rights of our colonial judiciary and dangerous to our colonial independence. Much as we admire the English Bench, we cannot allow that admiration to blind us to the excellence of our Colonial Bench. We have men on the Bench in Canada second to none in England. They have our utmost, our unbounded confidence. It will never do to allow that confidence to be shaken, that Bench to be humiliated, by the nod of an English Chief Justice.

Standing in the relation that England and Canada bear to each other, the jurisdiction recently arrogated by the English Court of Queen's Bench can only be supported on the hypothesis of the existence of an appellate jurisdiction—a superior right—superior power. But provision is made for appeals from the decisions of our Courts to Her Majesty in Privy Council, in the same manner that appeals lie from the decisions of English Courts to Her Majesty in the House of Lords. That and that alone is the only recognized, the only constitutional, channel of appeal from the colonies. With it Canada is at present satisfied. But whenever an English Court, in its zeal for the supposed cause of the slave, or from any other cause, without having appellate jurisdiction, chooses at the instance of the Secretary of an Anti-Slavery Association, or of any other zealot, to exercise such a jurisdiction, it is a duty which we owe to ourselves—to our laws—to our institutions—and to the laws and institutions of the mother country, to protest against the exercise of the jurisdiction.

We sincerely believe that if the English Court of Queen's Bench had not been as ignorant of our laws and institutions as it appears to have been of our geographical position, the writ would never have been

issued: This, however, is any thing but a justification for an act so fraught with consequences so mischievous.

We object not so much to the exercise of the jurisdiction in the particular case which has occasioned these remarks, as to its exercise on any occasion whatever. The exercise of such a jurisdiction is alike distasteful to our people, dangerous to our institutions, and hostile to our ideas of self-reliance and self-government. If we pride ourselves in one thing more than another it is in our ability for self-government; and if we are grateful to the mother country for any one thing more than another, it is that she has confided to us the reins of government. Our course is onward and forward. While pushing forward to take our place on the pedestal of nations, we have well nigh forgotten the acts of colonial misrule under which we at one time suffered. A recurrence to former checks will not only revive the recollection of what is past, but make us restive in the future.

It is to be hoped that the Provincial Parliament, which is about to assemble in Quebec, will take up the subject of the English *habeas corpus*, and have an understanding with the Imperial authorities about it. Few will be found to maintain the existence of such a jurisdiction, notwithstanding the *ex parte* determination of the English Queen's Bench to the contrary. None will be found to justify the exercise of the jurisdiction on any occasion whatever.—UPPER CANADA LAW JOURNAL, *March*, 1861.

ART. IV.—LORD BACON.

Personal History of Lord Bacon, from Unpublished Papers. By WILLIAM HEFWORTH DIXON, of the Inner Temple. London: Murray, 1861.

THE triumphs of historical writing, in the present day, are often sought in attempts to overthrow theories or opinions that have been accepted as unassailable and conclusive through a long course of historic tradition. We have lately had an historian that has deservedly gained great distinction by his works, who has been bold enough to start a theory opposed to the national creed, on a subject which, perhaps, more than any other in our history, has been familiar and popular,—the conduct of Henry VIII. to his queens, and especially to the beautiful Anne Boleyn, whom popular opinion had firmly maintained to have been the innocent victim of the uncontrollable lust and passion

of a tyrannical husband. We have now another author, Mr. William Hepworth Dixon, who seeks a niche in the temple of Clio by taking up the cause of the great Lord Bacon, and endeavouring to remove from his character the stain implied in the line of Pope, which describes him as,

“The wisest, brightest, meanest of mankind.”

No honour that could be conferred by literature would be greater than that which would wait upon him who could remove from the character of Bacon, the blot fixed upon it by his condemnation for bribery by the House of Lords, when he held the office of Lord High Chancellor of England. No lover of his race but would rejoice that this bright example of its intellectual power should have its lustre unimpaired through the restoration of his moral qualities unstained. But in proportion to the importance and value of the object, must be the rigidity of the proof. It would be unworthy of the rank of Bacon amongst the great instructors of mankind, and as the inventor of the inductive philosophy, to give him a popular acquittal, in which the instructed and informed do not concur. Yet, if it shall appear that Mr. Dixon has not succeeded in his task, the name of Bacon will remain effulgent as the sun, with the dark spot unnoticed, unless when traced out to vindicate truth.

It appeared a bad omen for Mr. Dixon's success, that, in the first paragraph of his book, he warns off those persons who may be supposed accustomed to examine, critically and analytically, the various aspects of a doubtful case, and addresses himself “to the young and pure, who, taught by heaven and not by rules, judge of character in the mass.” To them he gives some *a priori* reasons for Bacon's innocence. “Nature will not put a God or devil in one—that is the task of art. Can you be good and evil, wise and mean?” Nature will not, indeed, make such a compound as this sharp antithesis supposes. Neither was Bacon, in respect of his intellect and his virtues, a god, nor, in respect of his failings, a devil. The question is, Whether he did not yield to infirmities and temptations common to the whole human race?

“This lie against nature,” our author informs us, “broke into high literary force with Pope: no man of rank in letters had yet soiled Bacon’s fame.” That observation may be true, but it is easily explained. Pope wrote his “*Essay on Man*,” in which the well-known line appears, a hundred years, or more, after Bacon’s death. During all that time, the tradition of Bacon’s unhappy fall travelled onwards through posterity in its original colouring. If no writer soiled his fame, no writer could venture to oppose the historical tradition, by attempting to remove its tarnish. The best that his friends could do was to be silent; and we find no allusion to his impeachment in the *Life of Bacon* which Dr. Rawley (his friend and chaplain) published in 1657. It is not until some ardent, and perhaps injudicious, admirer of the genius and works of Bacon, undertakes the difficult task of presenting him to the enthusiast’s contemporaries as free from the stain his own contemporaries fixed upon him, that writers spring up to defend the truth. The partiality of Mr. Basil Montague, which led him as a student and editor of Bacon’s works, “to resort to any hypothesis rather than admit his hero in the wrong,” produced the celebrated essay on Bacon, by Lord Macaulay. Mr. Dixon must not, therefore, expect to win the honours for which he has striven, until his claims have been thoroughly examined and considered. In the mean time, he stands opposed in his conclusions to writers of most competent judgment: to Mr. Hallam, who, as will hereafter appear, has condemned the chief grounds of defence on which our author has relied,—to Lord Macaulay, who discussed the arguments of Mr. Montague with unexampled grace and logic,—to Lord Campbell, who brought to his “*Life of Lord Bacon*” great knowledge of the weight and value of testimony, and large experience of the behaviour and conduct of men under accusation and trial.

The “lie against nature” is a move beyond Mr. Montague. He only contended that, as Bacon was eminently a virtuous man, therefore his actions could not have been wrong. Our author would have it supposed to be a psychological impossibility that a mind so great, and endowed with such splendid powers, could

descend to the artifices and meanness of vulgar life. If he could have proved that hypothesis, it would have been a safer course than attempting a clearance on the facts. But it derives no support either from the Christian or Baconian philosophy. Providence has not been so partial as, in addition to high intellect, to give immunity from the temptations and weaknesses of the body. Extravagance will with all men, high or low, lead to debt and embarrassment; and when these press upon men who have elevated position and character to preserve, it often happens that their urgent wants are supplied by a resort to courses which neither reason nor conscience approves.

We do not intend to follow Mr. Dixon, through his defence of Lord Bacon, against the various minor charges that have been commonly levelled at him,—of ingratitude to Lord Essex—of a mercenary marriage—of aiding in the prosecution of, and in putting to torture the country parson, Peacham, and of truckling and slavish subserviency to the crown and its favourites for the purposes of personal gain and advancement; for these are subordinate to the great charge of bribery; and, although they prevent his being estimated as a man of lofty and unbending principles, they would perhaps be overlooked, or to a great degree softened down, if his character were relieved from the chief moral stain; and the removal of the former is of little consequence if the latter remains fixed. It is to the minor charges, however, that Mr. Dixon has devoted most of his rhetoric and research; he has treated the major charge, as we shall presently show, with a brevity and incompleteness that is quite remarkable, and as if he thought it prudent to avoid all details, and to rely on his own confident assertion. But, before we enter into the consideration of that charge, it is right to notice the new information which Mr. Dixon has introduced by his unpublished papers, which he appears to have used great diligence in collecting, and which give considerable insight into Bacon's personal habits and character.

They consist principally of letters which passed between

Lady Ann Bacon and her sons, Anthony and Francis ; whilst she, as the widow of the second marriage of the late Lord Keeper, Sir Nicholas Bacon, was residing at Gorhambury, and her sons were residing at Gray's Inn, in the chambers of Francis, or at Twickenham Park, the residence of Anthony. These letters are unfavourable to our author's hypothesis ; for, so far from showing that Bacon's intellectual powers absorbed all his time and attention, it is apparent from the letters that he was gratified by show and expense, and that he indulged in them to an extent which involved him in debt and difficulty.

The correspondence commenced when Bacon was in his thirty-second year ; he was in the House of Commons, but he had not attained any rank at the bar. The health of her sons, and the frugality of their expenditure, are the constant and anxious themes of Lady Ann's letters. The first, dated 24th May, 1592, is addressed to Anthony, who appears to have surprised his mother by a communication that he and his brother had provided a coach, and to have justified that expensive novelty on the ground of ill-health. The discreet mother disposes of that excuse by recommending Anthony to "avoid specially suppers, late and full, and procuring rest in convenient time, it helpeth much to digestion ;" and she declares his "brother's weak stomach to digest, to be caused and confirmed by untimely going to bed, and there musing, I know not what, when he should sleep ; and then in consequence, by late rising and long lying in bed, becoming continually sick."

And here we perceive how Bacon found time for thinking out the immortal works he wrote, whilst he appeared to those about him to be absorbed in business or pleasure. The unconscious mother knew not the energy of that mind which would not let her gifted son expend his hours in sleep.

Lady Ann (in the same letter) expresses alarm at the injury it might be to her sons to have provided a coach—a luxury which, it is manifest, had not spread even amongst the nobility, and would be looked upon as presumptuous in them. "I promise you, touching your coach, if it be so to your contentation,

it was not wisdom to have it seen and known at the court. You shall be as much pressed to lend, and your man for gain so ready to agree, that the discommodity thereof will be as great as the commodity. I would your health had been such as you needed not to have provided a coach but for a wife, but the will of God be done. You were best to excuse you by me, that I have desired the use of it, because, as I feel it to be true, my going is almost spent, and must be fain to be bold with you." Again, Lady Ann wrote in a subsequent letter, not dated, concerning the coach, "I like not your lending it to any lord or lady; it was not well it was so soon seen at court. Tell your brother I counsel you to send it no more. What had my Lady Shrewsbury to borrow your coach?"

The letters that follow are chiefly concerning debts and the means of discharging them. On the 16th April, 1593, Francis wrote to Lady Ann, putting her in remembrance of her motherly offer to his brother on the day she departed, that, to help him out of debt, she would be content to bestow her whole interest in markes upon him. "The which (he proceeds), unless it would please your ladyship to accomplish out of hand, I have just cause to fear that my brother will be put to a very shrewd plunge, either to forfeit his reversion to Harwin, or else to undersell it very much." On the 19th Sept. 1593, Francis wrote to Mr. Spencer, (a money-lender in the city,) arranging the renewal of an old bond of his own and his brother, in favour of Mr. Spencer, and promising to execute the new bond and to pay the "mesne profits." Again, on the 3rd Oct. 1593, he thanks his mother for £100, by which he should receive good ease, by its enabling him to make part payment of a debt which presseth. But he hopes the gift would not be to his brother's disfurnishing, which he reckons all one with his own want; he never having refused his security for me, as I, on the other side, never made any difficulty to do the like by him, according to our several occasions.

In a letter from Francis to Anthony, dated Gray's Inn, Dec. 10, 1594, we have an instance of this mutual guarantee—"I moved you to join me in security for £500, which I did purpose

then decidedly to have taken up; £300 odd secure, and £200 by way of forbearance, both to the satisfaction of Peter Van, our servant. I thank you; you assented. I have now agreed with Peter for the taking up of the whole of one man's, according to which I send you the bonds and securities. You shall find the bond to be of £600, which is one hundred more than it was at first. The jewel cost £500 and odd, as shall appear to you by my bond. Next I send you, immediately for use, an agreement, so to free you of one hundred, for which you stand bound to Mr. Willis Fleetwood."

Expensive jewels, we shall hereafter see, were amongst the temptations to which Bacon succumbed when chancellor. It was not without cause that their excellent mother, when, on the 3rd June, 1595, she wrote to her son Anthony, sympathizing with Francis' disappointment at the failure of the Earl of Essex's endeavour to procure for him, from Queen Elizabeth, the post of solicitor-general, remarked, "I had rather you both, with God's blessed favour, had very good health, and were well out of debt, than any office." These and other letters in the appendix are interesting materials for a full biography of Bacon: they relate, however, to his private life, and throw no new light on his public conduct.

We now proceed to examine how Mr. Dixon has dealt with the great blot on Bacon's fame; his treatment of which formed the great interest as well as the great difficulty of his book. It was with no little surprise we found that he has given none of the official documents connected with the accusation and condemnation for bribery; neither the charge against Bacon, nor the evidence by which it was supported; nor the several written communications which he made to the House of Lords. We think it will be apparent that these documents are necessary to a sound judgment on the case, and we therefore introduce a brief narrative of them. The inquiry commenced in the House of Commons, where a committee was appointed to examine into the proceedings of the courts of justice. The committee reported on the 15th March, 1620-1, that they accused the lord chancellor of corruption, and reported the evidence in two cases—those of

Christopher Aubrey and Edward Egerton. The Commons had a conference with the Lords on the accusation; and they referred to the Lords as the proper tribunal for investigating it, the examination of the proofs, and the punishment of the accused if found guilty. Bacon, aware of the proceedings in the lower house, withdrew from the upper house on the ground of ill-health. Had he remained, his duty as chancellor would have required him to have received from the messengers of the Commons the accusation and the demand for inquiry, and to have reported them to the House. The lord admiral, Buckingham, who was sent by King James to inquire after Bacon's health, reported to the Lords that he had been twice to visit him; that the first time he found his lordship sick and heavy; the second time he found him better and much comforted, because he had heard that the complaint of the Commons against him for grievances was come unto that House, wherein he assured himself to find honourable justice.

The lord admiral also presented to the House a letter addressed to the Lords by the lord chancellor, which he had been commissioned to deliver. In it Bacon assured the Lords that his sickness was not feigned; that he should be glad to preserve his honour and fame from complaints of base bribery; that he would not trick his innocency by cavillations, and asked to be allowed to except to the witnesses, to move questions for their cross-examination, and to produce his own witnesses for the discovery of the truth; and, lastly, if any more petitions of that nature came, that their Lordships would take no prejudice against a judge that made two hundred decrees and orders in a year (not to speak of the courses that had been taken for hunting out complaints against him), but that he might answer them according to the rules of justice. The Lords sent him a message in reply, that they intended to proceed in his cause according to the right rule of justice, and they should be glad if his Lordship should clear his honour therein; to which end they prayed him to provide for his defence.

The Lords appointed Sir James Ley, Chief Justice of the Com-

mon Pleas, their speaker during the absence of the chancellor. They also appointed three committees to investigate the charges, which increased in number; and before these committees, assisted by a judge or eminent counsel, numerous witnesses, sworn before the House, gave their evidence as in a judicial inquiry. During these proceedings Bacon, on the 22nd April, 1621, made another communication to the House. His former one, we have seen, stated his determination to make a full defence of his conduct; this was entitled "*The humble Submission and Supplication of the Lord Chancellor.*" It is very long, containing illustrations of his own position from characters in the Scriptures, and in ancient history. In it he, "without fig-leaves, ingenuously confessed and acknowledged that, having understood the particulars of the charge, not formally from the House, but enough to inform his conscience and memory, he found matter sufficient and full both to move him to desert his defence, and to move their lordships to condemn and censure him." He entered into considerable flattery of the Lords and of the King, and made it his humble suit that his penitent submission might be his sentence, the loss of his seal his punishment, and that their Lordships would recommend him to his majesty's grace and pardon for all that was past.

The Lords resolved, after debate, that the submission was not satisfactory; for that his confession therein was not fully nor particularly set down, but did in some sort extenuate it, and seemed to prescribe the sentence to be given against him by the House. They resolved that he should be charged with the briberies and corruptions complained of, but that respect being had to his person, as having yet the great seal, he should not be brought to the bar to hear the charge, but that it should be sent to him by messengers.

The Lords thereupon, on the 24th April, sent to Bacon, by the hands of Mr. Baron Denham and the Attorney-General, Sir Thomas Coventry, a document entitled, "*Corruptions charged on the Lord Chancellor, with the Proofs thereof.*" It consists of twenty-three articles, of which twenty-two are separate charges

of bribery proved before the committees, with the names of the witnesses who proved each charge; the twenty-third article being, that "the Lord Chancellor hath also given way to great exactions by his servants, both in respect of private seals, and likewise for sealing of injunctions, with other things—Proved by Thomas Manwood and Richard Keeling." The messengers reported that they had delivered the charge and required his lordship's answer, who said he would return one as soon as possible. It was again moved by Lord Southampton that Bacon should be required to appear at the bar, and answer from his own mouth; but that motion was overruled, and another message was sent on the 25th April, that their lordships having received a doubtful answer to the message they sent him yesterday, they sent again to him to know of him directly and presently, whether he would make his confession, or stand upon his defence. He returned an answer by the messengers, that "the Lord Chancellor will make no manner of defence to the charge, but meaneth to acknowledge corruption, and to make a particular confession to every point, and after that an humble submission. But humbly craves liberty, where the charge is more full than he finds the truth of the fact, he may make declaration of the truth in such particulars, the charge being brief, and containing not all circumstances." The Lords sent their messengers back again, to let his lordship know they had granted him time until the 30th April to make such confession and submission as his lordship intended to make.

On the 30th April, the Lords received "The Confession and humble Submission of me the Lord Chancellor—Upon advised consideration of the charge, descending into my own conscience, and calling my memory to account as far as I am able, I do plainly and ingenuously confess that I am guilty of corruption, and do renounce all defence, and put myself on the grace and mercy of your lordships." The confession then repeats each charge, appends his observations confessing or explaining each, and concludes by submitting himself to the judgment, grace, and mercy of their lordships, and that, if they proceed to sentence, it might not be heavy to his ruin.

The Lords sent a committee of twelve peers to the Chancellor with the confession, to tell him that the Lords do conceive it to be an ingenuous and full confession—to demand of him also whether it be his own hand that is subscribed to the same, and whether he will stand to it or no. The unhappy old man replied, “My Lords, it is my act, my hand and my heart, and I beseech your lordships to be merciful to a broken reed.”¹

We may complete our brief narrative by giving the sentence passed on Bacon by the Lords. They excused him, by reason of infirmities and sickness, from appearing at the bar to receive judgment, and adjudged him to undergo fine and ransom of £40,000—to be imprisoned in the Tower during the king’s pleasure—to be incapable of holding any office, place, or employment in the state or commonwealth—never to sit in parliament, nor to come within the verge of the court. The fine was remitted by the king, and after a short stay in the Tower he was released, and no other part of the sentence was enforced: a pension was also granted to him by the crown for his life.

Having now supplied information which we think ought to have been in the front of Mr. Dixon’s book, but which is not to be found in any part of it, we may proceed to consider the defence he has made for the great philosopher. It rests on two grounds: That the so-called bribes were fees of court, and that the accusation proceeded from the malevolence and artful contrivance of Sir Edward Coke, who, “every day since Bacon got the seals, has been scoring up accusations against him”—of Sir Lionel Cranfield, master of the Court of Wards—of Williams, Dean of Westminster, who, “if Bacon can be ruined, is to have the seals of chancellor”—of Villiers, Duke of Buckingham, his family, and dependants. The scope of our author’s argument will appear in the following passage:—

“17. To three such schemers as an old Chief Justice, a Master of the Court of Wards, and an ex-Chaplain to the Lord Chancellor, urged by the sharpest passions of cupidity and revenge,

¹ In the Lords’ Journals, vol. iii., and in Parliamentary or Constitutional History, vol. v., these documents will be found *in extenso*.

and backed by the whole tribe of Villiers, an accusation against the holder of the seals is easy enough to frame. The courts of law are full of abuses. The highest officer of the realm has no salary from the state. Custom imposes upon him a host of servants ; officers of his court and household ; masters, secretaries, ushers, clerks, receivers, porters, none of whom receives a mark a-year from the crown ; men who have bought their places, and who are paid, as he himself is paid, in fees and fines. The amounts of half these fees are left to chance, to the hope or gratitude of the suitor, often to the cupidity of the servant, or the length of the suitor's purse. The certain fines of Chancery, as subsequent inquiries show, are only thirteen hundred pounds a-year, the fluctuating fines still less ; beyond which beggarly sum the great establishments of the Lord Chancellor, his court, his household and his followers, gentlemen of quality, sons of peers and prelates, magistrates, deputy-lieutenants of counties, knights of the shire, have all to live on fees and presents. The causes heard are many—five or six hundred in every term ; the servants of the court are not all honest ; some indeed are flagitious rogues. The chancellor has not taken them voluntarily into his service, nor can he always turn them adrift ; their places are their freeholds. Amongst thousands of suitors, all of whom have paid fees into the court, half of whom must be smarting under the pangs of a lost cause, it will be strange indeed if cunning, malice, and unscrupulous power combined, cannot find some charge that may be tortured into the appearance of a wrong."

We will not inquire whether this picture of the almost regal state of a chancellor is intended to justify great latitude of remuneration, nor how previous chancellors avoided the gulf into which Bacon fell ; but we will proceed to consider the general argument, that the so-called bribes were fees of court, and that they were imputed as bribes, and not fees, by the malice of Coke and the power of Buckingham. Now it is fatal to this argument that Bacon did not meet the charge by a defence, that the money he confessed to have received was paid or received as fees, or

on pretence of any right or custom. If such a defence could have been sustained, no exculpation would be more complete. But, on the contrary, Bacon confesses, not merely on the accusations as framed, but that, on his own interpretation of them,—or, in his own words, that “in the points charged against him, although they should be taken as himself had declared them,—there was a great deal of corruption and neglect, for which he was heartily and penitently sorry.” We think it was calculated to procure from posterity the most favourable and lenient view of his conduct, that he attempted no ingenious or subtle defence to the accusations; for we are not to suppose that Bacon was ignorant of the immorality of judicial bribery, or that he could justify it to his own mind by subtle extenuations. He knew that his integrity should have been incorruptible, either through the readiness of the suitor to give, or the instrumentality of his servants to ask. He had written, when he was Solicitor-General, in his essay on “Great Place,” that “amongst the vices of authority is corruption. For corruption do not only bind thine own hands or thy servants’ hands from taking, but bind the hands of suitors also from offering. For integrity used doth the one; but integrity professed, and with a manifest detestation of bribery, doth the other. And avoid not only the fault, but the suspicion.” The other branch of our author’s argument is equally untenable. There may have been malice; but no malice or power could strike down a man like Bacon, conscious of integrity; could have contrived such accusations without any base of fact, or proved them by suborned witnesses before committees of the peers; those witnesses being not less than fifty in number, and many of them persons of rank and consideration. These arguments are not new. Mr. Hallam has disposed of them in a few words—“Some have vainly endeavoured to discover an excuse which he did not pretend to set up, and even ascribed the prosecution to the malice of Sir Edward Coke. But Coke took no prominent share in this business.” Coke was then an ordinary member of the House of Commons. But he had been Lord Chief Justice of the King’s Bench, from which high place

he was dismissed in disgrace in 1616, on charges which principally related to his speeches in his court, and his personal carriage before the king, his privy council, and judges. On that occasion Bacon rebuked and lectured him in an admonitory letter. But although Chief Justice of the highest court of law, his enemies did not charge him with taking "fees" as bribes; and our author is reduced to this dilemma, that if Coke took similar "fees," it might have been proved as a justification of Bacon, and with great force, as a *tu quoque* argument; but as it was not attempted to be proved, we may be sure that the same "abuses" did not prevail in all "the courts of law."

It seems superfluous to carry the inquiry further. We apprehend our readers will be satisfied that no amount of logical power or of sophistry can overthrow the conclusion that naturally flows from the preceding facts. But it is worth while to consider Mr. Dixon's treatment of the case; and, since he has not laid before his readers the evidence itself on which the conviction was founded, to examine into the accuracy of his own exposition of it. His first proposition is, "That few men in the Court or in the Church receive salaries from the Crown; and each has to keep his state and make his fortune out of fees and gifts. The same at the bar and on the bench." The judges, he says, in the reign of James I., were paid in great part in fees, and he might have added that the same custom continued during the reign of George III. But he does not prove his whole proposition, that they received gifts and fees, but proceeds to another which we shall not dispute, that "fees are not bribes." We must supply a distinction which he has not made, that the fees of Courts of Justice are fixed, either by sum certain, or according to the length of documents—that they are not paid to the judges, but received by the officers of the courts for the support of the establishment, including the judges, engaged in the administration of justice. Gifts cannot be defined in law terms, for they are unrecognized by the law as a mode of remuneration in the administration of justice; and we can only define them in common terms as voluntary, and unfixed in amount. We fear we

weary our readers by such commonplace distinctions, but Mr. Dixon has been forced to attempt to confound them. He asserts that "in the courts of justice these fees were open," and he speaks of "a system of various and precarious fees." That, however, is his own dictum. Yet on this point he unconsciously furnishes evidence which incontestably proves his inaccuracy, and that out of the mouth of Bacon himself. Amongst the unpublished papers, are the notes from the Bodleian library of a speech made by Bacon in the House of Commons, in opposition to a bill, the purpose of which was to reduce the fees paid to certain officers of the courts for copies of legal proceedings. The argument of Bacon is, "that the fees of office continue of one rate"—that they are like "to an ancient toll over a bridge"—that they are "men's freehold." He defends the judges from the imputation the bill cast upon them, "as if they had tolerated extortions, whereas there have been severe and strict courses taken, and that of late, for the distinguishing of lawful fees from new exactions; and fees reduced into tables, and they published and hanged up in courts, that the subjects be not poled or aggrieved." We think our readers will consider these notes, and especially the sentence last quoted, not only an answer to Mr. Dixon's assertion, but strong testimony to Bacon's knowledge, if he had not confessed it, that the gifts he took were not warranted by any law or custom, however loose.

Our author imputes the charges to malice, and draws an inference in favour of Bacon from the small number of the cases in the charge, twenty-two. "It is amazing there should be no more. In his four years of Chancery business Bacon had pronounced about seven thousand verdicts." It is curious to find a member of the Inner Temple using the term verdict in relation to Chancery. If he had consulted Bacon's first submission to the Lords (which we have quoted), he might have corrected his phrase and his numbers also; for Bacon there mentions that he made about two hundred decrees and orders in the year. "Each verdict (continues our author) must have hurt some man in fame or purse; must, by a law of nature, have seemed to the

losing man unjust. Does any one love the man who has pronounced against him? Would the most upright judge feel easy in having to put his honour or estate at the mercy of a jury, each of whom had been mulcted in his own court? Yet, out of these seven thousand sufferers, the skill of Coke and the rogucry of Churchill can only frame an accusation of twenty-two particulars, not one of them to the point."

We do not know in what school of philosophy Mr. Dixon finds "a law of nature" so diabolic, that the services of the judges entail upon them the hatred and revenge of all disappointed suitors; but we believe that he has described a state of things which does not exist, and never did exist in the worst of times. But it is wholly beside the question as an argument. If his argument was founded on fact—if the twenty-two cases were fees, or gifts admissible as fees, it should have been proved that in each of the remainder of the seven thousand cases fees or gifts had been paid. The universality of the fee or gift should have been shown, and it would have constituted a full defence. We will leave our author to calculate what the gross amount of those fees should have been, for which we will give him, as a basis, the amount of those charged, by the evidence before the House of Lords, to have been taken by Bacon in the twenty-two cases. The total amount or value of the gifts was £7000 and upwards, of the loans £3500.

We have before stated, and in that statement we confidently expect the concurrence of our readers, that without the official documents, or at least the articles of charge and the confession, it is impossible to form a competent judgment on the case. A biographer, whose purpose it is to give Bacon an acquittal against his own solemn confession, made to the highest tribunal in the country, can only succeed by showing that the charge submitted to Bacon was not framed in accordance with the evidence taken by the Lords; and then there would remain the difficulty, that the facts were known to Bacon, and that he gave his own narrative and colour of them in his confession. It is not enough to assert that James urged the chancellor to offer

no defence, to submit himself to the peers, to trust to his honour and to the crown. Bacon had an interview with the king, and what passed was reported to the House by the Lord Chamberlain—that Bacon had expressed his intention, when the proofs were full and undeniable, ingenuously to confess them, and put himself on the mercy of the Lords. But we not only think our author open to blame for omitting the confession, but we dispute his description of it. We are unable to find in any part of it, or in any other of the documents addressed to the House of Lords by Bacon, any foundation for the following passage:—"If he takes some share of blame, he takes to himself no share of guilt. He pleads guilty to carelessness, not to crime. But he points out, too, that all the irregularities found in his court occurred when he was new in office, strange to his clerks and registrars, overwhelmed with arrears of work." But the confession is, we must repeat, that he was guilty of corruption—even if the points charged against him be taken as he had declared them, "there was a great deal of corruption *and* neglect, for which he was heartily and penitently sorry." He does say, "that in all these particulars there are few or none that are not almost two years old, whereas those that have a habit of corruption do commonly wax worse and worse;" and we shall not quarrel with our author, who does not care to be logically accurate, when he interprets that remark with considerable latitude, and against the tenour of his former argument of fees and gifts, by saying, "The very last of them is two years old. For the latter half of his reign as chancellor, the vindictive inquisition of his enemies, aided by the treachery of his servants, has not been able to detail in his administration of justice a fault, much less a crime."

Having justified Bacon by the general argument of fees and malice, our author completes his work by giving him an acquittal on the twenty-two charges in detail. But here, again, we have the unpleasant duty of showing, in the absence of the charge and confession, how incorrectly he has stated their contents. The two first charges on the list are those of Egerton and Aubrey. These were the charges on which the House of Commons pro-

ceeded, and in which the inquiry originated. These our author describes "as too flimsy to stand alone." That of Egerton is thus disposed of,—“When Bacon got the seals, his friends and admirers clothed York House for him with plate, arras, furniture, and pictures; some sundry books, some money, some cups of silver and gold. In the crowd of presents came Egerton's ewer and purse, came as an expression of gratitude and friendship. No reference was made when they were given to any future act; nor had the Chancellor any knowledge of Egerton's having a suit in court. These facts are stated in the House by Sir Richard Young.” The charge contains nothing of an ewer and purse. They were mentioned in the House of Commons, but probably considered as “too flimsy” by the Lords. The charge is, however, of a much graver kind. It is that, in the cause between Rowland Egerton and Edward Egerton, Esqs., the Lord Chancellor received £500 on the part of Sir Rowland before he decreed the same. Bevill Thelwall deposed that he delivered £200 to the Lord Chancellor, which he received from Edward Egerton, in the same cause, and £400 more. This, then, is a charge of receiving bribes from both sides. Bacon's confession is, that upon a reference of all suits between the Egertons he made his award; “and some days after the sums mentioned in the charge were delivered to him from Sir Rowland. That Mr. Edward Egerton, flying off from his award, a suit was begun in Chancery by Sir Rowland Egerton to have the award confirmed, and a decree was made thereupon. That soon after his coming to the seal, when many presented him, he received the £400 of Mr. Egerton, but, as he remembered, it was for favours past.”

In Aubrey's case the charge is, that on the cause between Sir William Brunker and Aubrey, the Chancellor received from Aubrey £100. Bacon's confession is, “that on that cause he did acknowledge his receiving £100 of Aubrey.” Our author's defence is, “that it is clear the fee was paid in the usual way, openly paid, paid by advice of his own counsel, paid to the proper officer of the court.” These statements do not appear in the

charge or confession. If the latter statement is any justification, it does not extend to Egerton's case, where sums amounting to £1100 were paid into the Chancellor's own hands.

Thirteen cases are disposed of *en masse*. "They are of daily practice in the courts of law—common fees paid in the usual way, *after judgment given*." In the confession, it appears that in twelve of these cases the so-called fees amount to £2000—that ten of them were given after judgment, in one case a fortnight, in another a month; but in two cases the payment was *before judgment*. Thus, in the case of Sir John Trevor, £100, Bacon confessed "it was while his cause was depending." In the case of Lord Montague, he confessed "that he received money of the Lord Montague, while his suit was depending, to the amount of six or seven hundred pounds." With regard to the other case, making up the thirteen, "Common fees paid in the usual way," Bacon was charged with taking of French merchants £1000, to constrain the Vintners' Company to take 1500 tons of wine for which they had no use or need, at higher rates than the wine was at that time vendible; and "that he did, to accomplish the business, use very indirect means, by colour of his office and authority, without bill or suit depending, terrifying the vintners by threats and imprisonments to buy the wines." This charge was proved by five witnesses, and the Chancellor's own letters and orders. Bacon's confession is, "That Sir Thomas Smith did deal with him on behalf of the French Company, informing him that the vintners, by combination, refused to take the wines at any reasonable prices, and that they would destroy their trade, which the State was concerned in; and that the Company would gratify him with £1000 for the trouble he should take in it." He further confessed "that he propounded such a price as the vintners might gain £6 a ton, and the King afterwards, recommending the business to him as a matter that concerned his customs, he dealt the more peremptorily in it, and did, for a day or two, restrain some of those that were the most stiff in a messenger's hands; and afterwards the merchants presented him with £1000." We think our readers will consider

that nothing can be much worse than this case as confessed. He forced the Vintners' Company to buy the wine they did not want, at a price at which it was not vendible. We may be sure that the price was high enough to pay the Chancellor's "fee," and to leave a handsome profit to the Frenchmen.

We are next told that "Kennedy's present, of a cabinet for York House, has never been accepted—the Chancellor hearing that the artisan who made it has not been paid." The confession admits, "That a cabinet, alleged to be of the value of £800, (but not of half that value,) was sent to his house by Sir John Kennedy, but he refused to accept it, and was determined to send it back again." The cabinet was, however, not sent back, and in his confession he states, "That he was ready to return it to whom their Lordships should appoint."

A gift of £200 and a diamond ring, charged to be worth five or six hundred pounds, is thus softened down by our author:—"Reynel, an old neighbour and friend, gave him £200 towards furnishing York House, and sent him a ring on New-Year's day. Every body gives rings, every body takes rings on a New-Year's day." When we turn to the confession, we find that Bacon confessed "his receiving £200 of Sir George Reynel, his near relation, at his first coming to the seal, to be bestowed on furniture; but thinks this was before any suit began. And as to the diamond ring he received of him while his cause was depending, charged to be worth five or six hundred pounds, it was not of near that value; though, he confessed, it was too much for a new-year's gift."

A gift of £500 from Sir Ralph Hornsby is extenuated by a statement, that "it was made after judgment, though, as afterwards appeared, while a second much inferior cause was still in hearing." Bacon simply states, "that he received of Sir Ralph Hornsby, while his cause was depending, £500."

The case of Lady Wharton is said to be "of an unusual feature, because she brought her presents to the Chancellor herself; yet her gifts were openly made in the presence of the proper officer and his clerk;" and it is inferred that "no one in

his senses can suppose that the Chancellor would have done an act known to be illegal and immoral in the company of a registrar and clerk." Bacon, however, sets up no such excuse, nor draws such inference. He confessed, "that in the cause between the Lady Wharton and the coheirs of Sir Francis Willoughby, he received of the Lady Wharton £200 in gold, and at another time an hundred pieces, while the cause was depending."

From those charges, three in number, which accused Bacon of borrowing money from suitors, our author gives him an unqualified acquittal:—"Any man who borrows money may be as justly charged as taking bribes." Yet one of the loans of £1000 is confessed to have been made without security or interest, and with his own time given to him for repaying it. Another shows the danger of a judge borrowing money at all. The 13th Article charged him "with having used his influence as Lord Chancellor to require Huxley to forbear demanding payment of £400 due to him by Counton for six months, and then borrowing £500 from Counton. The money being unpaid, a suit grows between Huxley and Counton in Chancery, when his lordship decreed Counton to pay Huxley the debt, damages, and cost, when the money was in his own hands." The chancellor could make no other decree; he did not deny the statement, but says "that he did borrow the £500 of Counton, but looked upon it as a debt which he was obliged to repay."

"Thus," concludes our author, "after the most rigorous and vindictive scrutiny into his official acts, and into the official acts of his servants, not a single fee or remembrance traced to the chancellor can, by any fair construction, be called a bribe. Not one appears to have been given on a promise, not one appears to have been given in secret, not one is alleged to have corrupted justice." Our readers will be able to judge for themselves how far this conclusion is justified, now that we have given them a more copious insight into the facts of the several charges, as made and confessed, than our author thought expedient; nor do we think it necessary to discuss the rules of judicial morality

that he has laid down. We will, nevertheless, state that the defence has raised in our minds an admiration of the candour, the ingenuous honesty, and self-humiliation of Bacon, who, we think, acted up to his promise to the Lords, that "he would not, by the grace of God, trick up his innocency with cavillations, but plainly and ingenuously declare what he knew or remembered." He, as we have seen from his writings, had formed as high a standard of judicial purity as that which exists at the present day; and no sophistries could prevent his great mind perceiving the full force and effect of the system of misconduct into which he unhappily fell. We again express our humble opinion, that in confessing, and not defending his misconduct, he consulted his dignity, and his happiness, and gave an example of truth, penitence, and self-humiliation, which entitles him to the esteem of posterity; whilst he also made the best amends in his power to God and his country.

ART. V.—SMITH'S MANUAL OF EQUITY.

A Manual of Equity Jurisprudence; by JOSIAH W. SMITH, D.C.L., of Lincoln's Inn, Esq., Barrister-at-Law. Sixth Edition. London: V. & R. Stevens & Sons, 1861. Pp. xxiv.—478.

WE are sure that many of our readers will learn with pleasure that the learned author of this little work has produced a new edition. The "Manual" has, since its first publication, been an especial favourite with students, for whose use indeed, as the preface tells us, it was partly but not wholly intended. It has been "from the first" one of the text-books adopted by the Reader in Equity as the subjects of his examination of students for the bar; and accordingly a large and increasing body of lawyers owe to it their first notions of trusts, accident, and fraud, and of all the manifold branches which, springing from these three roots, have grown up under the fostering care of successive chancellors.

We have little to say here to those who are already acquainted with the nature of the work before us; we shall address ourselves first to others who as yet know it by name only, and shew them what they may expect, and what they must not expect, to find in it; in the latter part of the article we shall describe the points in which the present edition differs from those that have preceded it.

There is room for considerable diversity of opinion as to the proportions in which reports and treatises should be studied by those who aim at acquiring an intimate acquaintance with the principles of law. The treatise presents the subject in its entirety, in a more regular and scientific form. The report shews the almost infinite variety of the questions to which the business of life gives rise, and brings them before the reader in a shape more nearly resembling that in which they occur in the course of actual practice. Probably no experienced tutor would recommend the beginner to commence his studies by the perusal of reports; while objections of almost as great weight present themselves, if it be proposed to adopt for this purpose the works of those writers who have, as it were, condensed the contents of the reports into treatises of authority. The former course will often lead to ludicrous misconceptions of the point and bearing of the cases selected for study; while that student may rejoice in the possession of a mind of an exceptional order, who, in the opening of his career, derives any profit from even repeated readings of Coke, Fearne, or Sugden.

In no branch of legal science was the want of some work of a character intermediate between voluminous reports and elaborate treatises more felt, until lately, than in equity jurisprudence. All information required on the subject was doubtless to be found in the reports; but nothing but the experience of years of practice sufficed to enable even the most retentive memory to make familiar use of the matter there contained. Particular points would be found treated of in various works, by which a piecemeal knowledge of a great part of the system might be picked up; and the chapters on Demurrer and Plea, in the "Treatises on Pleading" of Lord Redesdale and others, supplied information in

a somewhat more systematic form. But how confused and unsatisfactory is the arrangement which treats the question, What are the rights of the parties? as subordinate to the question, How must the facts whence these rights arise be brought before the court? The proper task of a writer on Pleading is at an end, as regards this subject, when he has stated and illustrated the proposition that a Demurrer will be good in substance when the bill fails to state such facts as, if assumed to be true, will entitle the plaintiff to the relief prayed; while he rightly discusses at length all objections of form which can be made either to Bills or to Demurrers; and a similar remark applies to treatises on other branches of pleading.

It seems even more inconvenient to attempt to combine in one work the law, the pleading, and the practice of the Court of Chancery; this, however, was attempted in Maddock's "Principles and Practice," the bibliographical parent of the present well-known Headlam's "Daniell." So much of the book as related to jurisprudence has long been dropped, except so far as, in accordance with the inveterate custom above-mentioned, something of this is given in the chapters relating to points of pleading.

The first attempt made on a large scale to digest the multifarious contents of the reports into a regular treatise, was that of the late American judge, Professor Story, so many of whose works are cited as authorities in our own courts. This is not the place to express any opinion regarding the execution of this work, the design of which left nothing to be desired. Probably, however, English lawyers have been deterred from making so large an use of it as they otherwise would have done, by the fear lest the paragraph they were reading might turn out to be founded solely on decisions of American courts: this liability detracts much from the value of several other works, both of Story and of other writers, who make more or less frequent citation from American reports.

The first edition of the work now under review, appeared while yet Story's treatise was the only book professing to comprise in a scientific form the whole subject of equity jurispru-

dence. Mr. Smith's manual is described by him in his preface as of a semi-original character, bearing the same relation to the Commentaries as the Commentaries bear to the treatises and reports on which they are founded. This description admirably expresses the nature of the work undertaken. Mr. Smith confined himself to the matters treated by Story, rightly conceiving that any point omitted by him must be of trivial importance; and, going through the successive chapters and paragraphs of these Commentaries, he extracted the substance of the Professor's statements on each subject, giving the conclusions arrived at with occasional, but very sparing, notices of the grounds of these conclusions. All notices of authorities were omitted from the original edition, and a very considerable abridgment was thus effected, which was further carried out by the omission of many points of detail which do little or nothing more than illustrate the general propositions which are given. By means of these processes, the whole substance of the two large volumes is compressed into a small compass, and yet nothing of importance is omitted. To say this of any book is to praise it highly.

But the reader should be made to understand clearly what he may expect to find here. The book is not adapted for cursory perusal: nor does its plan allow of its affording much assistance in the practical work of answering cases, although in this latter respect the edition now under review has a great advantage over its predecessors, which we shall directly point out. There is no disguising the truth; the proper mode to use this book is to learn its pages by heart; that is to say, such a familiarity should be sought with each paragraph as to render it a part of those possessions of the mind which form portion as it were of the mind itself; or rather of that apparatus which the mind unconsciously uses in framing its judgment on each subject submitted to it, and the entire mass of which constitutes what is called "common-sense."¹ We venture then to say, that to no equity counsel can be attribu-

¹ Every particular pursuit has a peculiar stock of knowledge, the possession of which forms the "common-sense" of those who follow it. Probably there is little of this kind really common to all men of ordinary intelligence, whatever may be their race, country, or employment.

ted the possession of common-sense, who has not either learned this little book by heart, or stored his mind with the same knowledge by some equivalent process.

So much, then, may suffice for the description of the nature of the book in the form given by the first edition, from which we believe that the second but little differed. In the third a change was introduced: the second volume of Mr. Spence's "*Equity Jurisprudence*" had appeared, and was subjected by Mr. Josiah Smith to the same treatment as that of Professor Story had previously undergone. The result was a considerable addition to the bulk of the "Manual," and to its completeness on those subjects with which Mr. Spence dealt, and which, it will be remembered, do not include the whole jurisdiction of the Court of Chancery, a considerable portion of which would have constituted a third volume of his great work, had the learned author lived to carry out his design. No further change of plan of importance seems to have been made by Mr. Smith in the subsequent editions of his "Manual," the sixth of which is now before us.

The principal point in which the present edition differs from its predecessors, is one in which a great improvement has been made: a considerable number of references to recent cases has been added. Some of these were found in the earlier editions; but they now form a prominent feature in parts of the work, and are so numerous that a table of their names has been thought necessary. This table will add much to the ease of turning out the passage relating to any particular subject, which hitherto the want of a full index has rendered rather difficult: this, however, is not of much importance in a work which, as we have said, is essentially adapted for thorough "getting up," and not for reference.

In conclusion, we must express our satisfaction that Mr. Smith has by his literary labours, and especially by his share in framing the Consolidated Orders, earned for himself a distinction coveted by the most eminent advocate.

ART. VI.—ANCIENT LAW.

Ancient Law; its Connection with the Early History of Society, and its Relation to Modern Ideas. By HENRY SUMNER MAINE, Reader on Jurisprudence and the Civil Law at the Middle Temple. London: Murray, 1861.

THIS book will supply a void which has long existed in our literature of jurisprudence. We have no hesitation in saying, that nothing resembling it has yet appeared in an English dress, and that it will prove a valuable original contribution to the learned labours of continental jurists. Not that English literature is by any means destitute of philosophical speculations on the subject of law, or on the source of those social relations which bind together civilized communities. With the writings of Hobbes and Filmer, of Locke and of Hume, most educated persons are familiar. The true *object* of legislation—that of conducing to the general happiness of mankind—has been amply elucidated by Mr. Bentham; while the masterly effort of Mr. John Austin, to determine the province of jurisprudence, has left nothing to be desired for the completion of the logical analysis of legal phraseology. Scarcely any attempt however has, so far as we are aware, yet been made—at least in this country—to expound the historical filiation of those legal conceptions which are incorporated into the very life and movement of our existing social system. The posthumous disposition of property by will—the custom of primogeniture—the essential ingredients of contract—the remedial operations of equity; all these ideas are so familiar to us, that we find it difficult to realize the fact, that they have been slowly developed from rudimentary notions, with which in their natural state such ideas have little in common. The continuity of human thought, which has been amply acknowledged in the fields of physical science and politics, and to some extent also in theology and moral philosophy, appears to be tacitly treated by many well-informed persons as undis-

coverable in the field of jurisprudence. Yet it is certain that these conceptions, which now seem indigenous to the human mind, not only did not exist, but were not even possible, in a primitive condition of society. If this truth had not been kept out of sight, much of the fruitless controversy which exercised the master intellects of the eighteenth century would never have taken place. But the time was not come for the complete dethronement of the theory of innate ideas respecting rights of property and contractual obligations, because the debt of the new world to the old was far from being clearly admitted. Even now most persons fail to realize how completely the past has coloured all the present.

This independence of antiquity, which writers on the English common law are apt to assume, is not only false in fact, but pernicious in its consequences. English law, by insulating itself as much as possible from all other systems, not only erects a barrier to further improvement, but misinterprets the elements which enter into its own composition. The interpolation in Bracton, of whole passages from the "Digest," is indeed now notorious; but these textual plagiarisms are but as a drop in the ocean compared with the multifarious modes and forms of thought which have been derived to England from Roman jurisprudence.

It is not, however, with these special obligations of England to Rome, that Mr. Maine has concerned himself in the book before us. As he expressly tells us in the preface, the references to Roman law are merely by way of illustration. The scope of the book is nothing less than a historical deduction of elementary legal conceptions from the earliest ages of which we have any written record. It tracks these legal conceptions to their cradle, and lays bare to us the features of their infancy as they are found in India, in Greece, in Italy, and on the frontiers of the Roman empire. It thus purports to do for the special department of law what Whewell and others have done already for the inductive sciences, and Mr. Buckle is attempting for civilisation generally.

Mr. Maine differs from most other writers in England who have grappled with legal problems, in abandoning what has been called "the high *a priori* road," and employing the historical method as his sole engine of discovery. It is not difficult to show that this is the only method possible under the circumstances. Let the analysis of the legal and social phenomena which exist at the present day be ever so subtle and complete, it is certain, when used as a basis for theory, to involve a *petitio principii*. The human mind is quite unable entirely to emancipate itself from the preconceptions with which it is saturated, and is therefore incompetent to theorize on the data which it erroneously conceives to be elementary. However far the disintegration be carried, it is sure to import the ideas of the present into its exposition of the past. We have already alluded to one remarkable instance of this anachronism exhibited in the politico-philosophical speculations of the last century. Both Locke and Hobbes, as every body is aware, propounded theories of the origin of society. Each of these theories purported to account for the existence of property—the former by the supposition of a voluntary mutual agreement amongst mankind to forbear from interference with each other's rights; the latter by the equally arbitrary hypothesis of intimidation practised by the stronger upon the weaker individuals. But instances of this anachronism are not confined to the region of speculative intellect, they are even more conspicuous in the larger domain of practice. In all questions of international relationship, the law of nature still plays an important part; and, to go no further, the title by occupancy to newly-discovered territory, which one nation asserts against another, is based at the present day on the supposed principle of that ideal law. But what if the notions of agreement and occupancy, which these speculations and this practice involve, are themselves of recent introduction, and we are able, not only to indicate their origin, but to trace their development in known historical times? No answer more conclusive against these theories can be imagined, no argument more convincing to prove that the method which led up to them was fallacious.

One of the chief obstacles in the way of the application of the historical method to the study of law, has been the belief, which is even now widely prevalent, in what we may metaphorically term the primeval reign of Astræa. A golden age and a state of nature have been in turn the theme of the poet and the starting-point of the philosophical jurist. A propensity to picture an earlier, a simpler, and a purer stage of existence, to disengage all the evil which contaminates the present, and to reflect back the residue on the spotless mirror of the past—has ever been the characteristic of a large class of minds in every age of the world. One of the leading qualities of this golden idea is its remarkable plasticity, its adaptability to the requirements of the most opposite orders of intelligence. It fructified in the mind of the rigid stoic philosopher in the practical precept, "Live according to nature"—it fructified in the mind of the sentimentalist Rousseau in the theory of the *Contrat Social*. The stoic sought to escape the contradictions of every day experience, by obedience to the absorbing commands of a single principle, and, by reproducing the beneficent sway of nature over the tumultuous emotions of his own breast, to defy the assaults of the enemy within him. The French philosopher sought to reconstruct society after the model of the same unsullied original, but demanded, for the architects of the first political fabric, conceptions of rights and duties which were only developed in later and highly civilized ages.

The patriarchal state, which is the form in which society first presents herself to the historical inquirer, is a great blow to these fictions of the imagination. Not that they are absolutely annihilated by the mere fact that family-life is proved to have been anterior to civil life, but rather, by reason of the peculiar attributes which on a nearer inspection the patriarchal state discloses, they are rendered inadmissible. Indeed the existence of a patriarchal state was assumed on both sides of the celebrated controversy as to the nature of the Social Union. "The patriarchal theory of Sir R. Filmer was propounded," says Hallam, "not as a plausible hypothesis to explain the origin of

civil communities, but as a paramount title, by virtue of which all actual sovereigns were to reign with an unmitigated despotism, and was therefore easily refuted; but even Locke, his great opponent, admitted the fact of the patriarchal origin, though he based the lawfulness of all political government on the consent of the "community." Mr. Maine's graphic power has in effect exhibited the inconsistency involved in the latter of these two doctrines. He has presented us with a vivid and striking picture of the interior of the family household, and has shown us how the contractual relations between individuals, which are the prominent features of later times, were then not only unknown but impossible. The constitution of the family group—self-sufficient and self-contained—left no room for those external obligations which are implied in the rights and duties of individual persons. The all-absorbing power of the father merged all the subordinate rights, as it assumed all the responsibilities, of the family members. The phantasy of a political compact between individuals, as such, thus vanishes before the solid reality which historical research brings to light.

But, though the fiction of nature and her law has at length ceased to form a basis for the construction of civil society, it has been perpetuated by the school of Grotius in the region of international law. The ante-Grotian publicists, indeed, of whom the most celebrated flourished in Germany, found no difficulty in applying the *whole* of the Roman law to the regulation of the intercourse of nations. No doubt this was owing to the fact, that the Germano-Roman provinces were looked upon as still under the sway of the imperial Cæsar. But it may be justified *ex post facto* by other considerations. The earliest Roman law regulated the transactions between distinct family groups; modern international law regulates the transactions between separate civil communities. Now, there is an obvious parallel between these ancient patriarchal aggregates on the one hand, and modern independent states on the other. In both cases we posit the contractual capacity of the units, and in this consists the analogy between them. The public law of Europe was thus

easily provided for by merely a new application of the private law of Rome.

The theory of Grotius, which identified the law of nations with the law of nature, was more subtle and much more elastic. Grotius, to use Mr. Maine's words, "laid down unreservedly that natural law is the code of states, and thus put in operation a process which has continued almost down to our own day—the process of engrafting on the international system rules which are supposed to have been evolved from the unassisted contemplation of the conception of nature."

The success of the "*De Jure Belli et Pacis*" was, however, due to a further assumption, borrowed from the Antonine jurists; viz., that this Law of nature was identical with that section of Roman jurisprudence which is known by the name of the *Jus Gentium*. This branch of Roman law, the origin of which is to be sought in the prime necessities of the citizens of the old republic, in their dealings with members of the surrounding tribes, many of whom had taken up their residence in the city, had been transformed by the infusion of Stoic philosophy from Greece into the standard of true simplicity, to which all human institutions ought to conform. Divested of the cumbrous ceremonial which characterized the pure civil law of ancient Rome, it harmonized in many of its attributes with the Stoical conception of nature. The ambiguity of the phrase *Jus Gentium* lent additional colour to the Grotian hypothesis. No sooner was that hypothesis firmly grasped than the Dutch publicist found ready to his hand a large body of rules which offered a solution—with all the authority of a *lex scripta*—of the most complicated international problems. No wonder that the newly vitalized jurisprudence took root so deeply and grew so rapidly. The materials had long been at hand, it wanted but the Promethean genius to fetch down the fire which should kindle them into a flame. The torch which Grotius lighted has illuminated succeeding ages, but it must never be forgotten that the light which it has diffused is borrowed mainly from a Roman source.

The questions which have divided the successors of Grotius

have been not so much as to the origin of international precepts, as of the nature of the sanction by which these precepts are to be enforced. Of the various theories on this head which have been propounded by the post-Grotian publicists, that of a commonwealth of nations, advocated by Wolf, perhaps departed farthest from the truth. It invoked the assistance of a bold metaphor in order to supply an obvious deficiency. But to employ the political sanction, which holds together a commonwealth of citizens, as an illustration of the constraining force which controls the intercourse of independent states, is only to make the absence of any thing like a *positive* law of nations the more glaring. Those writers are more consistent with fact who deny the existence of any thing more than a law of nations which is purely conventional. The truth seems to lie between the two, and is, to some extent, in accordance with the Grotian doctrines, though it adds no weight to its fundamental hypothesis. The duties owed by one state to another in their collective capacities, do not arise from any such fictions as a republic of nations or a state of nature; nor are the ties which bind states to each other merely imposed by mutual consent, and capable of being relaxed or severed at pleasure. The considerations which give birth to international duties are wholly of a moral character, and the duties which are imposed are therefore only of *imperfect* obligation. It is sufficient that they are recognized as binding by the common opinion of the civilized world. In this view the standard of international law, so far from being capable of determination *a priori*, as represented by Grotius, must therefore fluctuate with the light and growth of each succeeding age.

But to return. We have said that one of the chief results of this book is to demonstrate the value of the historical mode of investigation; and we proceed to show with what success this has been done in the inquiry into—1. the origin of property; 2. the origin of wills; and 3. the origin of contract.

1. The origin of the right of property is almost entirely lost in the obscurity which envelopes the infancy of human institutions. It is impossible to conceive a period in the world's history when

some kind of property was not respected, without picturing to ourselves a scene of perpetual violence and outrage. In such a state of society, if we may so far anticipate the use of the term, the proposition that "might is right" might be affirmed without falsehood or paradox; but the meaning would then be, that no other sanction was recognised therein but that of physical force. In this savage condition of mankind, no *right* of property would in fact exist, for every right involves a corresponding duty; and no corresponding duty would here be imposed on any person beyond that which would be dictated by the instinct of self-preservation. And so long as we conceive that there was necessarily a point of time when society was not yet organized, and individuals had not yet grouped themselves into communities, so long shall we find it impossible to realize the transition from a state of anarchy to that other state in which private property came to be recognised, except by resorting to fictions analogous to that of the social compact. From adopting this alternative, to which we are driven by *a priori* speculation, we are happily relieved by the aid of historical testimony. We were forced to theorize about original compacts, because we based our calculations on the *individual* as the unit of social life. To the same prominence which has been thus accorded to the individual by writers on the origin of society is also due the theory of occupancy as an explanation of the origin of property. "The earth," says Blackstone, "and all things contained therein, were the general property of mankind, from the immediate gift of the Creator. Not that the communion of goods seems ever to have been applicable, even in the earliest ages, to aught but the substance of the thing; nor could be extended to the use of it. For, *by the law of nature and reason*, he who first began to use it acquired therein a kind of transient property that lasted so long as he was using it, and no longer; or, to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot upon it for

rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and *contrary to the law of nature*, to have driven him by force; but the instant that he quitted the use and occupation of it, another might seize it without injustice. . . . When mankind increased in number, it became necessary to entertain conceptions of more permanent dominion, and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used." This theory of occupancy by individuals, as the earliest mode of acquiring property, is completely refuted by historical investigation into the original forms of ownership. The village communities of India, and the Servian and Croatian villages on the borders of the Turkish empire, exhibit the most primeval types of society known to the civilized world. In these, individual ownership, at least as to immovables, can scarcely be said to exist, and *co-ownership* is the universal rule. The constitution of the Russian villages, as the researches of Haxthausen and Tengoborski have shown, is of a similar character. The land belongs to the community, and not to the individual peasants, who, as between themselves, have no distinct proprietary rights in the soil. Even where an individual landowner has the power of parting with his individual share, he cannot do so without the consent of the village, and the purchaser succeeds to the obligations as well as to the rights of the vendor. The land rights of the villagers, *inter se*, are as completely absorbed in those of the aggregate whole, as were the proprietary rights of the Roman children in the power of the *paterfamilias*. In communities constituted in this way, acquisition by occupancy on the part of the individual members can clearly have no place, and it can be only as between the village groups themselves that it can be made available. The sphere of its operations is thus materially narrowed; and, where these groups come into collision with each other, it is highly improbable that any appeal to justice or the law of nature would be permitted to adjust their rival claims. The Blackstonian theory of occupancy as the origin of property, must

therefore be relegated to that limbo to which historical research has already consigned the Social Contract.

All that we know of the history of property among the Romans bears out the conclusions just arrived at. Occupancy, like tradition, was one of the modes of acquisition which was said to be *jure gentium*, and the *jus gentium* was, as we have seen, a body of principles grafted on and subordinate to the ancient Roman law. Occupancy was indeed styled a *natural* mode of acquisition; but by that expression was not meant that it was a primitive or original mode, except by an application of the *ex post facto* hypothesis, which identified the *jus gentium* with the stoical law of nature. On the other hand, the peculiar solemnities which attached to the modes of acquisition *jure civili*, are so many tokens of their antiquity. The five passive witnesses of the *mancipatio*, the presence of the copper and scales, the kinds of property which were alone appropriately transferred thereby, perhaps the very term itself (implying that the transaction took place rather between families than between individuals, for *manus* and *familia* seem to have been originally identical), all point in this same direction. Nor was the class of things capable of being *occupied* either of prime necessity, or those which would be most prized in the infancy of a community. Some of them, such as jewels disinterred for the first time, presuppose a very advanced state of material development.

The complexity of the conceptions involved in the Roman idea of property must ever prove a formidable objection to those who are disposed to regard the past as characterised by the attribute of simplicity. In the first place, we have two distinct modes of acquisition—the civil and the natural—the one resulting in Quiritarian, the other in Bonitarian ownership. Each of these modes of acquisition has its appropriate subject-matter; but the civil was always the more solemn and the more complete of the two, though on the ground of its greater convenience the natural mode gradually superseded it. Inside this division into these two kinds of ownership, lies the distinction between property and possession, which has been so completely eluci-

dated by the masterly treatise of Savigny. As this possession was the remote ancestor of our feudal system, it may be worth while briefly to glance at what the term involved. The term "possession" comprises not only the fact of physical detention, or what is tantamount to it, but also the intention to hold *out against all the world except the true and complete owner*. It may be called, without doing violence to language, a lower form of proprietorship; for the possessor was able to assert his claims to the thing possessed by a peculiar legal process—the possessory remedy of the interdict. But even when the corporal fact and the mental intention were both present, the possession was not necessarily complete. If it had been obtained by violence, by clandestine encroachment, or on terms which made it revocable at the pleasure of the true owner, no possession proper arose, and no possessory remedy could be resorted to by the pseudo-possessor on his eviction. On the other hand, if the possession was not vitiated by any of these three ingredients, of violence, fraud, or precariousness, it might be matured by lapse of time into true ownership. The species of ownership which was thus reached, and the length of time which was required for the completion of the process, depended on the nature of the thing on which the lapse of time operated. In as much as the ceremonial of mancipation (the only mode of transfer known to the early Romans) was only applicable to a limited class of things, so soon as the commercial relations of Rome began to expand, it became necessary to perfect the title of Quiritarian ownership by the help of a legal confirmation. This was effected by the process called usucapion, or, in other words, where a *bona fide* possessor had acquired a *res Mancipi* by tradition or any other inappropriate form of transfer, and had possessed the same for two years in the case of immovables, or for one year in the case of movables, Quiritarian ownership was the result. The office which usucapion performed for *res Mancipi*, was in a measure performed for *res nec Mancipi* by prescription. But the period which was required to have elapsed was a longer one, and the ownership acquired was

not Quiritarian but Bonitarian. In other words, the title conferred on the *bona fide* possessor was not legal but equitable; and, though the magistrate before whom the owner enforced his rights was the same person in each case, the mode of procedure, and the forms of actions adapted to the title, were distinct.

At first sight, there is little obvious connection between possession, as above described, and the European system of feudal tenure. Yet, on nearer inspection, we shall discover an historical affinity between them. The prominence in Roman law of this idea of possession, as something short of dominion, has been satisfactorily explained by Savigny as having had reference to the holdings of the *ager publicus* by the patricians of Rome. It was the peculiarity of this tenure of the patricians, that as against members of their own class they had an absolute title, while as against the state they had no title at all. Closely analogous to the relations of the patricians under the republic to the *ager publicus*, was that of the provincials of imperial Rome to the *ager vectigalis*. The former tenure was in fact the historical parent of the latter. The possession of the provincials was insured to them on payment of a fixed sum of money, which was collected by the *publicani*, or farmers of the public revenue. But the tenure of the *ager vectigalis* was, like that of the *ager publicus*, in theory at least, a precarious one, and the land was always resumable at the pleasure of the State. The first introduction of the element of permanence arose from the necessities of the municipal corporations, which form so prominent a feature in the constitution of the Roman empire. These bodies, fluctuating from year to year in their constituent parts, and unable to cultivate for themselves, seem to have inaugurated the system, so familiar to us, of farming their lands by letting them on long leases. As in the case of the *ager vectigalis*, which no doubt served as a model, the subordinate title of the lessees was acknowledged by the payment of a fixed money rent. As long as this rent was paid the lessee was supposed to be secured in his tenancy. The leased land devolved, on the death of the beneficiary, to his representatives, but the reversion was vested

in the lessors. The tenure itself was called *emphyteusis*, and it has evidently much in common with the feudal system. One thing only was wanting—the substitution of military service for a money payment.

The dangers to which the empire was exposed by the incursions of the barbarians on the frontier supplied this link in the chain of affiliation. Under the later emperors the veterans of the Roman legions who were quartered on the outskirts of the imperial territory, received *agri vectigales* for cultivation, on condition of rendering assistance, when required, against the incursions of the neighbouring tribes. The terms of the holding were exactly those of the *emphyteusis*, as modified for the convenience of the municipalities. Friendly hordes of barbarians soon found their account in ranging themselves under the eagles of the imperial city, and enjoying her protection against their domestic enemies. The system of military tenure thus spread into the heart of the German forests. The diversity of conditions which mark the early feudal grants, and the elaborate machinery of limitations, by which the rights of the parties were controlled, is only explicable on some such hypothesis as this fusion of an advanced with a primitive civilisation. We must remember that, at the time of the friendly contact of the Roman and the barbarian, the contract law of the former had attained its highest stage of development. Hence the variety of stipulations which is observable in the terms of the earliest feudal holdings. It is not necessary to acquiesce in the view of Sir F. Palgrave, who sees in the word *emphyteusis* itself the original root of the Scotch “feu” and the English “feud,” but it is impossible not to recognize, in this kind of proprietorship, the strong resemblance to that system of tenure which has for several centuries prevailed in the greater portion of Western Europe.

2. The chapter in Mr. Maine's book which treats of Property is subsequent and subordinate to that which treats of Wills. To a superficial reader this arrangement will probably appear to be an inversion of the natural order; but more mature reflection

shows that it is not only justifiable, but required in order to express a real historical sequence. Whether, *for the purposes of an institutional treatise*, the Law of Persons should precede or follow the Law of Things, is a question which has occupied, not without reason, the attention of continental jurists. In the institutes of Justinian, as is well known, the Law of Persons is first treated of; while Sir M. Hale recommends the contrary arrangement. The answer, as has been pointed out by Suarez, must depend on the number of *præcognoscenda* which is required of the student. But the historian of juridical development can be in no doubt that the law of persons did in fact precede the law of things, so far as the two are capable of being separated. Ancient law is much more concerned with *status* than with *contract*; with the capacities and incapacities of individuals than with modes of alienation and transfer of property. At Rome, the power of the *paterfamilias*, the legal nonentity of his sons and his slaves, and, where that form of marriage had been solemnized which involved the *conventio in manum*, of his wife also, played a much more important part in legal science than the transfer of dominion or the creation of servitudes. It is probably in reference to this circumstance that Mr. Maine postpones Property to Wills. For Wills were originally part of the law of persons rather than of the law of things. The essential of a Roman will was the nomination of the heirs, and the object of nominating the heirs was to prolong the legal personality of the deceased. Just as when the family group subsisted entire, and formed the unit of the infant commonwealth, the family itself preserved its identity, notwithstanding any change that took place within it consequent on the removal of one *paterfamilias* and the substitution of another; so when the family was replaced by the individual, and the fractional members of the state began to assume an integral character, the fiction of a universal succession to the dead man, preserved the continuity of the legal personality amid all the vicissitudes occasioned by death in the series of individuals.

The Roman heir, besides assuming all the rights and obliga-

tions which attached to his ancestor, was also clothed with a religious responsibility. On him devolved the duty of performing the sacrificial rites which were peculiar to the family of the deceased. The prospect of an abrupt termination of his pedigree—of the extinction, so to speak, of the fire which burned on his domestic hearth—was one from which every pious Roman recoiled with a sense of horror, which we find it difficult to imagine. So long as the deceased left children or grandchildren behind him to perpetuate his family, no will was desired, or even at first allowed; and it was to provide for the case of a person dying without natural heirs that the practice of testation was introduced. This same want had previously been supplied by the processes of adoption and adrogation, and Mr. Maine informs us that, among the Hindoos, the place of wills is still completely occupied by the former mode of substitution. As it was necessary that the person named to succeed the deceased should be duly qualified for the solemn duties which were imposed on him, both ceremonies—that of adoption and that of testation—were performed under religious superintendence. For the former, the sanction of the pontifices had to be obtained, and the latter was obliged to be ratified by the *gens* of the testator sitting in the *comitia calata*, which were specially summoned for this and similar purposes. But this species of will—if indeed we can apply the term to what was nothing more than the open nomination of a universal successor, with the consent of the house to which the testator belonged—was exclusively confined to the Patrician order. Soldiers on active service (*in procinctu*) seem very early to have possessed a similar privilege of testation, and military wills always preserved their original simplicity, which contrasted forcibly with the elaborate solemnities required to be observed by civilians in later times. But neither in the case of the Patrician, nor that of the soldier on service, was the posthumous disposition of *property* the leading idea of the testament. Still less was the permission to make a will an indulgence to the caprice of testators. We have abundant proof that

intestacy and not testation was the original rule at Rome; and that, when testation became merely a means of disposing of property, the early practice was to imitate the course of intestate succession which the law had previously marked out. Thus, the *heirs ab intestato* of a deceased *paterfamilias* were all his children and grandchildren who were in his immediate power at his death; and, when the fiction of emancipation was yet unheard of, all his descendants were provided for by the legal course of devolution. But so soon as the necessities of the time required that the civil tie which bound the son to the father should be relaxed, and that sons should be permitted to acquire property for themselves, the emancipation which effected this drew after it ulterior consequences. It not only set the son free from the *patria potestas*, but, by severing completely the agnatic bond, it excluded him from the class of *heredes ab intestato*. The inequality of posthumous distribution which thus arose stimulated the desire of testation. We thus see that it was in order to redress, and not to create inequality, that testaments first came into vogue.

The history of the Plebeian Will differs considerably from that of the Patrician. Shut out from all communion of religious rites with the aristocratic fraternity of ancient Rome, and destitute of any such common tie between themselves, the plebeians based their testaments on a purely civil foundation. The will of the plebeians, *like* those of the patricians, were not only not secret, but they were not revocable. The wills of the plebeians, *unlike* those of the patricians, had at first nothing even of a posthumous character. The form of testation did not differ from that of an ordinary conveyance *inter vivos*. It was, in fact, only a particular application of the mancipation *perces et libram*. The testator, usually when at the point of death, sold himself to his heir, and, in the event of his recovery, only retained his rights at the pleasure of the vendee. A practice in stronger contrast to modern will-making can scarcely be imagined, yet an Englishman ought not to be surprised to find that the one is the antitype of the other. There is little in common between the form of a simple ancient feoffment and a modern deed of grant, yet the

operation of both is one and the same. When the ceremony of mancipation had been duly performed, it became usual to express the objects of it in a written document. The aid of some such authenticating instrument became indispensable as the provisions of the testator increased in number and complication. The seven persons who were required to be present at the mancipation were a sufficient depository of the testator's intentions, so long as the designation of an individual successor was all that was compassed. But, when the power of marking out legacies was legalized, something more than oral testimony became desirable. Both forms of testation, the patrician as well as the plebeian, were gradually superseded by the written instrument which thenceforward, without any other formality, became the sole exponent of the last intentions of the testator. It was by virtue of this supersession that the Roman testament assumed its posthumous character. But the elimination of the symbolical process occasioned an incompleteness in the legal operation of the will. The written document, the provisions of which were enforceable before the proctor, did not confer the legal qualities of heirship on the *heres institutus*, though it gave him all the analogous equitable rights incident thereto. In the language of the Roman jurisprudence, he was treated *as if* (*quasi*) he was heir, and by the aid of the doctrine of usucapion he did in fact, after a short lapse of time, completely acquire that character. Complete facility in effecting the distribution of property was not attained until the introduction of testamentary trusts, which, however, were not allowed to operate on more than three-fourths of the entire inheritance. The remaining one-fourth could always, under the later imperial constitutions, be claimed by the heir.

Closely connected with the Roman trust is the modern system of entails, since, by conferring an estate on A, in trust to leave it to B, and by conferring a similar trust on B in favour of C, a succession of tenants for life was created, approximating to the limitations of an English family settlement. The later Roman law allowed the introduction of clauses against alienation and incumbrance, like the irritant and resolute clauses in a Scotch

deed of tailzie. But the perpetual entail, which continued for so many centuries to prejudice the interests of our northern neighbours, was never tolerated at Rome, and Justinian confined the right within the compass of four generations.

The custom of primogeniture, which, in all countries under the dominion of feudal law, governs intestate succession to real property, cannot, like the modern deed of entail, claim a direct Roman origin. As we have seen, co-ownership is the rule in the early history of property, and it was the rule which governed intestate succession at Rome down to the latest days of the empire. The custom of primogeniture is of motley parentage, but it is mainly due to the weakness of the early feudal communities. The head of the feudal clan was, to some extent, an antitype of the head of the archaic family. As the head of the clan he was invested with supreme authority over its members; but, unlike the archaic *paterfamilias*, he was not trustee of the family possessions for the equal benefit of all. The idea of co-ownership was not reproduced in the barbaric tribes along with that of patriarchal headship; and the result was, that the possessions of the tribe centred in the person of its military chieftain. In the custom of primogeniture we thus find exhibited the two extremities of the social scale. In the selection of an individual as chief, we have an image of the patriarchal state; in the devolution of the tribal property on that chief, to be enjoyed by him, we see the common interests of the members entirely overridden. This strangely derived custom finds the justification of its continuance in the convenience of landed proprietors, and preserves its vitality in England by virtue of the constitutional safeguards which it affords. But it is important that the advocates for its extension should not weaken their position by taking up its defence upon historically erroneous grounds.

3. To trace the influence of Roman contract law on the entire field of modern European thought would involve a dissertation on theology and political philosophy as well as on jurisprudence. There is scarcely any department of modern science, with the

exception of the physical, which it has not in some measure coloured. To the political philosophers of the last century it furnished, as we have already seen, a complete phraseology and a set of definite conceptions. Without some acquaintance with the Roman contract law, many of those writers are absolutely unintelligible. But it is not on this account only that the subject is an interesting one. In the history of contract we have a striking illustration of the progress of society from the external to the internal—from the outward symbolical gesture to the unseen mental intention. In its earliest stage the cumbrous ceremonial is everything, and the inward consent little or nothing; in its latest stage, the consent is everything, and the ceremonial is entirely discarded.

The analysis of the term agreement may be considered to have been completely effected in England on the publication, in 1832, of the first edition of Mr. Austin's "*Province of Jurisprudence Determined*;" but Mr. Maine has the credit of being the first of our English writers who has attempted to trace the mode of its development. Mr. Austin showed that the essence of an agreement or convention lay in the promise on the one side, and the expectation of performance on the other; and that both these elements being present, a moral duty resulted to the promisor to perform his promise, that is to say, not to baffle the expectations of the promisee. This simple convention was in Roman law termed a pact, and was enforceable in a few cases by the civil law, in several others by the Prætorian court; in others, again, by neither. In the latter case it was styled a *nudum pactum*. Such a pact might be available as a plea by a defendant, but could not be declared upon by a plaintiff. The use of this term by most English lawyers discloses a misconception of its true meaning. In English law, the term *nudum pactum* is commonly employed to denote an agreement destitute of consideration. This is not positively incorrect, since such an agreement, not being under seal, cannot be enforced either at law or in equity. But the two expressions are by no means co-extensive. The proper equivalent for an agreement destitute of con-

sideration is *conventio sine causa*, and both may be reckoned as synonymous with the term "unilateral contract." For an executory agreement into which a consideration enters is not one agreement but two, since both parties promise to do or give something, and each assents to the offer of, and expects performance from, the other. Now, it is exactly to such a mutual transaction as this that the term bilateral contract is properly applied. Similarly, an agreement without consideration may be shown to be in all cases convertible with a unilateral contract. A naked pact, on the other hand, is simply an agreement to which the law does not annex an obligation, and is opposed to a *pactum vestitum*, or a convention enforceable by law. The first may be either with or without consideration; for it may be unilateral, or it may be bilateral, though doubtless the instances are rare where the nonperformance on either side of a bilateral contract could not be made the ground of an action. Pacts which were enforceable by the Prætorian court only, corresponded to our agreements in equity; pacts which were enforceable by the civil law (as the *pactum donationis* and the *pactum de dote constituenda*), differed in no respect from contracts except in the comparative recency of their introduction.

The fourfold classification of contracts by the Roman jurists into verbal, literal, real, and consensual, was based on the mode in which the obligation was annexed by the law to the convention—the fourth class only differing from the three former in the circumstance, that the law annexed the obligation, not to any formal words, writings, or acts, but to the mere consent of the parties. We must not, however, suppose that this consent could be absent in the three former classes of contract, though in the fourth the consent stood out more prominently, because there was no recognised ceremonial under which it could be concealed.

A good illustration of the distinction between the consensual and the other contracts offers itself in the marriage law of Scotland as compared with that of England. In England it is not enough that the parties consent to marry, though each party

may have a moral right to expect performance from the other. In order that the legal effects of marriage may ensue, the parties must have recourse either to the ecclesiastical or to the civil ceremony, and it is only on the solemnisation by the priest, or the entry in the Registrar's book, that the legal incidents of marriage are annexed to the contract. Mutual consent is a necessary ingredient, in order that these forms may be valid in their operation, for no compliance with the form would have any effect where, as in the case of a lunatic, consent could be proved to demonstration to have been wanting. In Scotland, the mere attested consent of the parties is sufficient, and to this consent the law annexes all the legal qualities and consequences of marriage.

In the early stage of society, the sphere of contract was, as its patriarchal constitution manifests, necessarily very limited; nor is it correct to represent the primitive condition of mankind as peculiarly characterized by the observance of good faith. Indeed, the abstract conception of contract, as such, was of comparatively late development. Mr. Maine, with striking ingenuity, points out how the contract may have gradually disengaged itself from the conveyance; for, that the two ideas were originally blended in practice is not only highly probable, from the abstract nature of the former as compared with the latter, but is also borne out by the fact that both are denoted by a common term (*nexum*). The contract, according to Mr. Maine's conjecture, first isolated itself from the conveyance when the conveyance was for some reason or other left incomplete. An expectation of future performance was thereby created, and we arrive at once at what analysis has shown to be the primary ingredient in every true contract. This hypothesis also offers a plausible explanation of the rigour with which the ancient Roman law treated the debtor, for the elucidation of which we must refer the reader to Mr. Maine's ninth chapter.

After tracing the primary legal conceptions, such as those of property, wills, and contracts, to their fountain-head, it becomes interesting to inquire what are the external landmarks which define the growth of jurisprudence. Mr. Maine, in the opening pages of his

book, presents us with a sketch of the development of imperative law, the various stages of which are shown to coincide with certain political changes. We first find regulative law embodied in the insulated dicta of kings (*βασίλεις*); secondly, in a collection of customs locked up in the breasts of an aristocratical body; and thirdly, laws written in a code and promulgated to the people at large. The appearance of these last is synchronous with the rise of the popular element in the state. The main point of difference between the Stationary and Progressive Societies, consists, according to Mr. Maine, in the uses which they have made of their codes. The code of Brahminical India was an embodiment of corrupt customs, and its effect was to stereotype the absurdities of superstition. The code of the early Roman people served only as a new starting-point for the improvement of society. The feeble civilization of the Hindoo, and the degenerating influences of caste, Mr. Maine attributes to the late compilation of the laws of Menu; while, in the case of the Roman, the early publication of the Twelve Tables rendered this social stagnation impossible, because it took place at a time when usage was still wholesome. But we may observe, in reference to the contrast thus ingeniously drawn, that the position of the laws of Menu in reference to Hindoo law is not the historical counterpart of that occupied by the Twelve Tables in reference to the law of Rome. The compilation known by the name of the laws of Menu bears on the face of it evidence of the existence of an earlier Hindoo code; so that the abuses with which it abounds cannot be adduced as a proof of the fatal effects of deferred codification. Thus we read in the book on judicature this clause, "Each day let a king decide causes one after another under the eighteen principal titles of law, by arguments and rules drawn from local usages and from *written codes*." The value of Mr. Maine's illustration is thus seriously diminished on investigation, and we are driven to ascribe the superstitious observances of the Hindoos to other and more recondite causes. But, to deal more generally with this question, we venture to think that Mr.

Maine has much overrated the agency of codification in directing the progress of human thought. He himself tells us that "the ancient codes were doubtless originally suggested by the discovery and diffusion of the art of writing," and that "the Roman code was merely an enunciation in words of the existing customs of the Roman people." But then we must remember that other things were written besides codes, and that we cannot isolate the effects produced by the Twelve Tables on the jural thinking of succeeding centuries, any more than we can separate the results of the printing in England of one class of literature from those due to the printing of any other class. Nor is it reasonable to suppose that the growth of customs which formed the staple of the Twelve Tables was suddenly arrested by their promulgation; so that any thing like what Mr. Maine speaks of as "a sharply defined epoch" was then commenced. Nature does not thus act *per saltum*, and the same set of antecedents which dictated those customs dictated also the code in which they were continued. The correlation of social forces has been so admirably expounded by Mr. J. S. Mill, that we cannot forbear to quote his language:—"Whatever," says the author of the *System of Logic*, "affects in an appreciable degree any one element of the social state, affects through it all the other elements. The mode of production of all social phenomena is one great case of intermixture of laws. We can never either understand in theory, or command in practice, the condition of society in any one respect, without taking into consideration its condition in all other respects. There is no social phenomenon which is not more or less influenced by every other part of the condition of the same society, and therefore by every cause which is influencing any other of the contemporaneous social phenomena." The problem of the difference between the stationary and progressive societies remains, as Mr. Maine says, to be yet solved, and solved it will never be completely till the social philosopher is able to take into account the disturbing elements of these concurrent causes.

"When primitive law has once been embodied in a code,

there is an end of what may be called its spontaneous development." Henceforward there are three instrumentalities—fictions, equity, and legislation—which, at least in the progressive societies, direct each in their turn the course of legal modification. Of the first and third we have not here space to speak; but the second is fraught with so much interest to Englishmen, by reason of the instructive parallel which the mature Roman jurisprudence offers to that of our own country, that we cannot altogether pass it over in silence.

Property, wills, contract, once legally recognized, the rigid forms which characterize the early stage of their existence were modified at Rome to meet the requirements of the times mainly by the agency of the Prætorian jurisdiction. This jurisdiction is, as we have just said, in many points analogous to that of the English Chancery. But the origin of equity amongst the Romans bore little resemblance to its origin in England. The infant Roman republic presents to us the idea of a close society united under a common head, and connected by the mutual ties of brotherhood. This personal tie, sanctified by the communion of religious rites, and in no degree based on, or strengthened by, topographical contiguity, gave birth to that extreme jealousy of any invasion of her privileges which marks the early political career of Patrician Rome. Slowly and reluctantly are the members of the neighbouring tribes of Italy admitted within the political pale; and when the admission is partially effected, exclusion from participation in the pure Roman ritual signalizes the inferiority of the alien inhabitants of the city. The necessity of enlarging the sphere of commercial transactions led at length, as we have already remarked, to a modification of the ancient rigid law, and hence the first glimpse which we gain of equity is in the dealings of the Roman with the foreigner. Thus, the original Roman equity is not remedial of felt defects—not a conscious improvement on the ancient civil law. It is rather the adoption of a *lower* legal standard out of condescension to an inferior race. It is, however, to the introduction of the Stoic philosophy into Rome that the free

growth of equity is to be traced. The conceptions of nature and her laws did more to mitigate the severity and exclusiveness of the Romans, than all the political necessities of the times anterior to the first Punic war. After that epoch, law and philosophy went hand in hand, and the Roman prætor, who was deeply imbued with both, ameliorated the one by the simple standard of the other. The growth of equity was arrested by the compilation, in the reign of Hadrian, of the Perpetual Edict of Salvius Julianus; and after the era of the legislation of Justinian, the distinction between Civil and Prætorian—Quiritarian and Bonitarian—vanished altogether.

If we compare with this the growth of the English Chancery, we shall find that the latter is due to very different causes. In England, equity was at first based on moral rather than on political grounds, and was at its first introduction recognised as an agent, whose office it was to modify and supersede the asperities and inequalities of the common law. In the ancient *Curia Regis*, as it existed under the first three or four Normans, the king seems to have been the supreme president of the Judicature. Gradually the *Curia Regis* threw off as its offshoots the Exchequer, the Common Pleas, and the King's Bench. But these courts had no originating power. This they derived entirely from the Cancellarius as vicegerent of the king. The power of originating writs and of deciding cases of conscience, was the main source of the Chancery jurisdiction. But this power only existed by virtue of the Chancellor's ecclesiastical character, and his supposed peculiar conversance with the doctrines of morality.

Similarly, if we compare the machineries of the Roman and the English equity, we shall find a wide difference between them. The equitable machinery of the Romans was never distinct from their legal machinery. Whether the action were *directa* or *utilis*, it was in either case given or presided over by the Prætor. The Prætor merely held office for a single year, so that the most various intelligences were rapidly brought to bear on the elucidation of philosophical principles. Hence the large development

which the Prætorian law experienced in the course of four or five centuries, a development enormous if we compare it with the slow progress of our own down to the chancellorship of Lord Eldon (when the growth of English equity may be said to have been arrested), and take into account the infinitely greater exigencies for equitable decision which modern times present.

We must here close our remarks on this very able work; but cannot do so without paying our tribute to the elegance of style and the precision of language which distinguish it throughout. The latter of these qualities is, we are happy to say, not uncommon among our writers on legal science; but Mr. Maine enjoys the command of a fund of metaphor, which is always justly applied, and always illustrates with marvellous power the inherent difficulties of the subject. For not the least of the characteristics of this book is its apparent simplicity. As the author has, wisely as we think, forbore to encumber his pages with citation of authorities, they do not at a first glance suggest that accumulation of learning which is apt to repel the general reader. But even the most flowing and brilliant passages are in many cases charged with much condensed thought and research. Mr. Maine evidently does not write for lawyers only. Many of them are too apt to neglect with complacency the history of the materials of their art. The value of the book will be appreciated far beyond the precincts of the Inns of Court; and, when thoroughly understood, must, we feel assured, exert an important influence on one of the most important topics of the day—the slowly-evolving problem of legal reform.

ART. VII.—JOURNAL OF A GLOUCESTERSHIRE
JUSTICE, A.D. 1715-1756.

Journal of the Rev. Francis Welles, Vicar of Prestbury, Gloucestershire, and Justice of the Peace for the County of Gloucester, A.D. 1715 to 1756. Folio. M.S.

IN our times a Gloucestershire magistrate desiring to do honour to her Majesty's Justices of Assize, or to meet his brethren in Quarter Sessions assembled, has but few impediments to encounter. Impracticable roads like those over which his ancestors toiled, are reckoned among things that have been. His county town is the centre of a system of railways, by some one of which, in the great majority of instances, he may be deposited safely, speedily, and "fresh as a bridegroom" upon the scene of his duties. A century and a half ago things were widely different; and those of his functions which required the presence of a Justice of the Peace beyond the limits of his own division, required some zeal in the performance. When the sceptre had but newly departed from the house of Stuart, the dwellers in the vale of Gloucester were sparing and infrequent worshippers of the goddess Trivia; the lines of communication, even between towns of importance, consisted of sunken lanes, mere ravines by summer and water-courses by winter, or deep wheel-tracks, less easy to be traversed than the unenclosed heath and fern on either side. When, therefore, the Reverend Francis Welles, Vicar of Prestbury, and Justice of the Peace for the County of Gloucester, on January 11th, 1715, took his place for the first time on the Bench at the Quarter Sessions for the county of Gloucester, it may be assumed, taking into consideration the time of year and the shortcomings of the road surveyors (of which more hereafter), that it was a sense of duty, rather than the prospect of enjoyment, which made him a wanderer from his own fireside.

In the minuteness of its detail, and the sharp, well defined

outlines which it presents of men and manners long passed away, the old vellum-covered book in which the venerable magistrate has recorded his legal experiences, possesses to all appearance much of the faithfulness of the daguerreotype. We live, while we read, in another age. We see and converse with men who wear swords and red-heeled shoes. We stand in the presence of grave Judges of Assize, whose names are seldom heard and almost forgotten in Westminster Hall—we hear their charges to the assembled magistracy—we see malefactors who have long ceased to be accountable to earthly tribunals, the contemporaries of Jack Sheppard and Jonathan Wild, arraigned before them. The *peine forte et dure* is in operation. The hangman drives a thriving trade, now and then perchance anathematising the gaol fever for robbing him at once of his patients and his perquisites. Justices of the Peace in full-bottomed wigs and velvet coats, stiff with gold lace, meet to hold Quarter Sessions in the County Town. We see them in solemn conclave assembled—we hear the arguments of counsel, whose “mouths are cold,” in “settlement cases,” the subjects whereof shall no more vex constable nor weary the spirit of overseer; we are present at the board where the magistracy and the bar dine amicably together, and discuss “nice sharp quilllets of the law” over their sober cups. We reject the present and the future, and live only in the past, as we peruse the lines penned a century and a half since by that most laborious and painstaking of Justices, the Reverend Francis Welles.

Our notice of this interesting record of other days would be probably incomplete without a passing glance at the place of abode of its author. Prestbury, the habitation and scene of the duties, clerical and petty sessional, of Mr. Welles, would appear to have experienced in its time much of the vicissitudes to which localities and individuals are alike subject. Sir Robert Atkyns, in his history of Gloucestershire, informs us it was “a considerable market town until consumed by fire in the reign of Henry the Seventh;” and we find it still so distinguished by Mr. Welles, who, on January 4th, 1715, granted “a warrant to

the overseers of Prestbury against John Barnard, for relief of his wife, then sick and chargeable to the *Town*." Subsequently, however, to the above-mentioned calamity, it seems to have dwindled into a remote and obscure village, in which condition it remained until partially reinvigorated by the rising importance of Cheltenham, of which it now forms a thriving suburb. At the period, however, to which we are referred, both town and suburb were alike unimportant and unknown. The main road from London and Oxford to Gloucester, in the reign of George the First, and long afterwards, skirted the ridge of the Cotswolds, some four or five miles to the south; and a few rough lanes, difficult everywhere, and here and there precipitous, and seldom perhaps used for aught beyond "pack and prime" purposes, were all that served to connect the inhabitants of the district with the world beyond.

The family of Mr. Welles would appear to have been long resident in Prestbury; for it seems that, in 1669, Francis Wells was Vicar of the Parish.¹ This gentleman, we may fairly infer, was the father of the reverend magistrate who has bequeathed to succeeding generations so vivid and minutely finished a picture of his own times. The identity of the name, and a few dates furnished by the manuscript, lead irresistibly to this conclusion.

The utility of preserving a record of his judicial experiences seems from the first to have occurred to Mr. Welles, and accordingly the earliest entry in the book is as follows:—

"December ye 4th, 1714. I was sworn in a justice of the peace for the County of Gloucester."

The latest entry, which purports to be in the handwriting of his son, runs thus:—

"My Father the Reverend Mr. Francis Welles died May 30th 1756 aged about 90, having been above 40 years an Acting Justice of the Peace: and about a year before he died I took out my dedimus and began to act."

We gather, therefore, that Mr. Welles must have been born in or about the year 1666 (the year of the Great Fire of

¹ Sir R. Atkyns's "Ancient and Present State of Gloucestershire."

London), that his father was Vicar of Prestbury before him, and that he had attained the ripe age of forty-eight or fifty when he began to exercise the functions of a Justice of the Peace.

That he was a staunch friend of the house of Brunswick, may be inferred from the fact, that he was placed upon the Commission of the Peace within three months after the landing of George I. at Greenwich to assume possession of his new dominions. And in truth they were violent and disjointed times when the old magistrate entered upon the duties of his office. The political caldron, with its unquiet ingredients of Jacobite and Hanoverian, and High and Low Churchman, seethed fiercely, but he is unmoved by the turmoil which rends the kingdom and shakes the throne itself. It almost provokes a smile to read his quaint, quiet records, side by side with the history of the period. They seem oil-drops upon the tortured waters. Plaided Highlander and English Dragoon were lying stark and stiff on the doubtful field of Sheriffmuir, when Mr. Welles issued his warrant to the Constables of Prestbury and Winchcomb "to apprehend two dangerous wandering rogues." Rebellion has bad luck—the Earl of Derwentwater and the Lord Kenmuir are made "shorter by the head" on Tower Hill—the contemporaneous acts of the Gloucestershire Justice are "an order to remove Giles Hobs and his wife from Prestbury to Charlton Ks." (Kings), and "a warrant to Ralph Turner of Whitcomb Magna, against Walter Holder and his wife and daughter for abusing him." But even in these records, attuned to peace and order, we detect now and then a discordant note; at times a discoloured bubble rising to the surface of the stream tells of danger and disturbance beneath. John Hill of Cheltenham, and another are "bound in 40 li: for the appearance of Mary Careless at next Qu: Sess: for saying twice King George was a Papist dog, and Mary Hill for answering No, he was a Presbyterian." A little further on the following entry occurs—"Tho: Eyres, spectacle-maker of Gloucester, ten: in 20 li: to appear at the next Qu: Sess: for singing a seditious song, and saying

he would do it whether it were for or against the government; John Youddell, of Cripplegate, London, Gent: ten: in £20 li: to prosecute, and Wm. Jefferis of Cheltenham, shoemaker, ten: in 5 li: to give evidence." Occasionally we read signs of the times in the charges of Judges of Assize to the assembled magistracy. At the Assizes held at Gloucester, August 13th, 1716, before Lord Chief Baron Bury and Mr. Justice Eyre, the latter in his charge takes notice, "that the rising up in arms for a public end (as for redressing any supposed grievances), is high treason within the Statute 25th Edward III. And so adjudged in several reigns. And agreed by all the judges in the reign of the late Qu: Ann, in the case of pulling down the meeting-houses in London." (The latter is an allusion to the popular outbreaks consequent upon the trial of Dr. Sacheverell.) On July 16th, 1722, at the Assizes held before Lord Chief Baron Montague and Mr. Justice Dormer, "Pitt of Gloucester was indicted for breaking the arm of the King's Statue, and at first pleaded guilty; but being told that he then confessed the whole indictment as laid, and that containing many aggravations, he pleaded not guilty, and traversed the indictment to try it next assizes," when, as we learn afterwards, the culprit being found guilty, was fined a hundred pounds, sentenced to six months' imprisonment, and to find sureties for his good behaviour for a year. Upon a subsequent occasion, another learned judge is careful to inform the Grand Jury that, "in presenting scandalous or seditious books,¹ it is not sufficient to present the books themselves by their titles, for no indictment can be founded upon such a presentment; but they must single out some passages in the books which are obnoxious and present them, and then an indictment will lie." And at the assizes held August 8th, 1723, Mr. Baron

¹ Among the libels and seditious ballads that were industriously circulated by hawkers and others during the early part of the reign of George I., the following may be enumerated—"Stand fast to the Church."—"Where are our Bishops now!"—"The Religion of King George."—"No Presbyterian Government."—"The States Gamester."—"Æsop in mourning."—"No Lord Protector, or The Duke of Marlborough's design defeated." The Lord Mayor of London caused several of those who distributed the above to be apprehended and sent to the House of Correction, a step of which his Majesty, by Lord Townshend, his Secretary of State, was pleased to approve.

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mentioned, not having been accorded her. He is a stern disciplinarian, and a rigid upholder of female decency and decorum. For "twice prophanely cursing," and for want of sufficient distress, he ruthlessly orders Jane Richardson to be placed in the stocks for the space of two hours. For "haunting ale-houses with lewd fellows," Margaret Mealing and Jane Arcol come particularly under the ban of his displeasure, as does also Frances Williams, a damsel who, loving well rather than wisely, is necessitated, on the 13th April, 1715, to appear before the Reverend magistrate, in accordance with the law as it then stood, "to be examined about her great belly." A week subsequently she is again brought before him "touching the aforesaid *felony*,"—an expression which seems to indicate that wrath at her backslidings had rendered him as incapable of the due classification of offences as Elbow and Dogberry themselves. To such matters as the above, as well as summonses for assaults, &c., disputes between husbandmen and their labourers upon the score of wages, differences between masters and their apprentices, and other things falling within the ordinary duties of a Justice in Petty Sessions, the first column is entirely dedicated.

But it is in the second of these columns that we must look for matter more interesting and important. This portion of the manuscript relates solely to proceedings at Assizes and Quarter Sessions. We are furnished with the names of the Judges of Assize, together with an epitome of their charges to the Grand Jury; and now and then Mr. Welles indulges in some entertaining observations, respecting their demeanour and mode of conducting business. We have also the names of the Chairmen of Quarter Sessions; (it was then customary to elect a presiding magistrate on every occasion, instead of, as now, appointing a gentleman permanently to the office;) and amongst the most active of the Justices of that day appear Mr. Cox (of Lupiatt or Lypiatt), Mr. Viny, Sir Richard Cocks, Mr. Player, Mr. Cox (of Gloucester), Mr. Delabere, Mr. Cocks, Mr. Hyet, Sir John Guise, Mr. Thomas Cook, Mr. Hayward, Mr. Colchester, Sir John Dutton, and others, of which names a few are to be found on

the Commission of the Peace for the County at the present day. Mr. Welles appears to have entered boldly and without a shiver upon the performance of his new duties; and on the very first occasion of his attendance at Quarter Sessions, upon the discussion of a disputed question of settlement law, we find him among the dissentients from the majority of the court. Here is his own account of the matter—"At the General Quarter Sessions of the Peace, Jan. 11th, 1715. Mr. Cox of Lupiat, Chairman. A man hired for a year served it within a week: then was married. Thereupon was immediately removed to the place of his last settlement by order of two Justices. The order was Quashed, and the man settled where last hired and served so near his time, and then forced away. But I think this was by the fault of ye counsel. For iff it had been stiffly insisted upon, and the Bench divided, it might have gone the other way. For I have heard the Court formely judged marriage a good cause for putting away a servant. And iff so he did not serve his full year; consequently being removed for a just cause could not gain a settlement. And I know several Justices were of this opinion." Here it is submitted upon the authority of the then recent case of *The Inhabitants of Faringdon v. The Inhabitants of Witty*, 2 Salkeld, 527, (decided upon the Statute 3 Will. & M. c. 11,) where it is expressly laid down that the marriage of a servant during his service, or even between the contract and entering upon the service, provided it be not done fraudulently, will not prevent the settlement, that the dissentients in this instance were wrong; and that in not "stiffly insisting" on the point the learned counsel who argued the case displayed more judgment than Mr. Welles gives him credit for in the above note of the case.

On the 26th April, and on the 15th July following, we again find Mr. Welles keen and observant at his post at Quarter Sessions; but two or three unimportant questions upon the law of settlement only are mentioned. On the latter of these occasions, however, "'twas agreed to erect a Bridewell in the Parish just without Bristol at the charge of the County, 500 li: to be

allowed for it, 200 li: to be paid this year and 100 li: a year after till the whole be paid"—a slenderness of outlay which seems to indicate, if proof were wanting, that in the reign of George I. model prisons and reformatories were as yet undreamed of.

There is a note of a remarkable case which came before Mr. Justice Blencowe at the Assizes held at Gloucester on the 6th August in the same year. It is as follows:—"A woman was found guilty by the Coroner's inquest for the murder of her bastard child. The Cor: issues his warrant to the Constable of the Parish to apprehend her; but she is taken by a person in another parish (and I think County) who had no warrant, and is brought by him to the Constable who had the warrant: he refuses to take her, and she escapes. The Court was moved to indite the Constable. The Judge said the Constable was right. Conveying her to gaol should have been a charge to the parish, and the parish ought to have done it where she was taken." A state of things which demonstrates that in the days when Judge Blencowe administered justice, the law, like the sloth, may have had strong teeth and claws, but sometimes an equally unready mode of getting at her provender.

Sir John Blencowe was appointed a puisne Baron of the Exchequer on 18th September, 1696. On the 22nd April in the following year he became a puisne Judge of the Common Pleas, and resigned in 1722.

On the 7th of April, 1716, Mr. Welles granted "a warrant to John Prinne, Esqre., against Tho: Nicholls and Rich: Robbins, late overseers of the poor of Cheltenham, for relieving *without a Badge*, and other misdemeanours." These officials appear to have infringed a now obsolete Statute, 8 & 9 Will. III. c. 30, s. 2, which to the end that money raised for the relief of the poor and impotent, "may not be misapplied and consumed by the idle, sturdy, and disorderly Beggars," provides that "every such person as shall be upon the Collection and receive relief of any Parish or Place, and the wife and children of any such person cohabiting in the same house (such child only excepted as shall

outlines which it presents of men and manners long passed away, the old vellum-covered book in which the venerable magistrate has recorded his legal experiences, possesses to all appearance much of the faithfulness of the daguerreotype. We live, while we read, in another age. We see and converse with men who wear swords and red-heeled shoes. We stand in the presence of grave Judges of Assize, whose names are seldom heard and almost forgotten in Westminster Hall—we hear their charges to the assembled magistracy—we see malefactors who have long ceased to be accountable to earthly tribunals, the contemporaries of Jack Sheppard and Jonathan Wild, arraigned before them. The *peine forte et dure* is in operation. The hangman drives a thriving trade, now and then perchance anathematising the gaol fever for robbing him at once of his patients and his perquisites. Justices of the Peace in full-bottomed wigs and velvet coats, stiff with gold lace, meet to hold Quarter Sessions in the County Town. We see them in solemn conclave assembled—we hear the arguments of counsel, whose “mouths are cold,” in “settlement cases,” the subjects whereof shall no more vex constable nor weary the spirit of overseer; we are present at the board where the magistracy and the bar dine amicably together, and discuss “nice sharp quilllets of the law” over their sober cups. We reject the present and the future, and live only in the past, as we peruse the lines penned a century and a half since by that most laborious and painstaking of Justices, the Reverend Francis Welles.

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Welles, who adds the following brief note to the above, written evidently with a different pen, and at a subsequent time:—"Mr. Brown (one of the counsel attending Gloucester Sessions) tells me their reason was because he liv'd as an apprentice, which I scarce understand."

Sir James Montague, the Junior Judge of these Assizes, was appointed a Baron of the Exchequer, November 22nd, 1714. He was afterwards a Commissioner of the Great Seal, and became Chief Baron, May 9th, 1722.

On October 10th, 1717, Mr. Welles granted a warrant "to discharge Cornelius Fielding, a Trooper in Col. Molesworth's Regiment of Dragoons, from an arrest for debt." Soldiers were indebted for such immunity from process as they then enjoyed, to 3 Geo. I. c. 2, and 4 Geo. I. c. 4 (both very recent acts at the time of the granting of the above warrant), the joint effect of which was, that no soldier should be taken out of the service by any process, except it were in some criminal matter, or for a real debt amounting to £10, of which affidavit was to be made; and if any soldier were otherwise arrested, a Justice of Peace, by warrant under his hand, should discharge him. And now, by the last Annual Mutiny Act, 20 Vict. c. 13, s. 52, "Any person enlisted as a soldier, &c., shall be liable to be taken out of Her Majesty's service only by process or execution on account of any charge of felony or misdemeanour," &c., "or on account of an original debt proved by affidavit of the plaintiff, or some one on his behalf, to amount to the value of £30 at the least," &c.

The Quarter Sessions held July 16th, 1717, Mr. Player, Chairman, do not appear to have presented any materials for observation. The Judges of the Assizes held August 5th, were Mr. Justice Blencowe and Mr. Baron Price, the latter of whom "pressed the Justices to be careful about the Constable's returns of Freeholders at Michaelmas. He observed that in some County five or six tryals were forced to be put off for want of Hundredors, occasioned by a Constable's neglecting his return. And was of opinion an action would lie against the Sheriff if he returned any person upon a Jury who was not in the Constable's return."

Sir Robert Price was appointed a Baron of the Exchequer, June 24th, 1702, and was afterwards transferred to the Common Pleas, October 29th, 1726. At the accession of George I. it was expected that he would have been removed from the Bench, the general impression being that he was any thing but enthusiastic upon the subject of the Protestant Succession. He appears, however, to have expressed no unreadiness to go down to Bristol, for the purpose of trying certain persons who had been guilty of a riot there, on the day of the King's Coronation, which he did in company of Sir Littleton Powys and Sir Robert Tracy, the other Judges appointed for this service. To his pliability upon this occasion he was probably indebted for his continuance in office.

The Quarter Sessions held October 8th, 1717, and January 14th, 1718, on both which occasions Mr. Viney was the presiding Justice, appear to have presented nothing more remarkable than some settlement cases turning upon questions of hiring and service, a branch of law which seems to have been especially productive of litigation in those days, and to have afforded both Justices and Sessional Barristers a wide field for speculation and discussion.

At the Assizes held March 17th, 1718, before Mr. Justice Powys and Mr. Justice Eyre, Mr. Welles observed "nothing remarkable." He appears, however, to have again taken sweet counsel with Mr. Brown, above-mentioned, concerning a decision of their Lordships upon a settlement case which had been drawn up for their decision, by order of the Justices, at the preceding Quarter Sessions.

The senior Judge of Assize upon this occasion, was Sir Littleton Powys, who was appointed a Baron of the Exchequer, October 28th, 1700, and resigned 1725. He must be distinguished from Sir Thomas Powis, who was appointed a Justice of the King's Bench, June 13th, 1713, but was superseded October 14th, in the following year, probably for reasons similar to those which endangered the appointment of Mr. Baron Price.

From this time down to July 26th in the same year, when the

Assizes were held before Mr. Justice Dormer and Mr. Baron Fortescue Aland, Mr. Welles has nothing to communicate but a few unimportant settlement cases disposed of at the intervening Quarter Sessions. Upon this occasion, however, he gives the following account of an action tried before Mr. Baron Fortescue Aland, which we furnish, not as involving any abstruse and difficult point, but as illustrative of the careful and methodical character of the writer, who seems to have neglected no opportunity of acquiring that legal knowledge which he evidently considered indispensable to the proper fulfilment of his duties as a Justice of the Peace.

“An action of the case was brought by a man that was bit by a dog against the owner of the dog, setting forth that the dog was very snappish and used to bite people, and that the owner knew it, &c. But ’twas only proved that he had bit one woman some years before, and not so as to draw blood, and she said she did not tell the owner of it, ’twas so inconsiderable. Judge Aland observ’d in such a special action every particular must be proved. That there ought at least two facts to prove a use or custom: that only one was pretended in this case and that a very inconsiderable one (before that upon which the action was brought), and that it did not appear that the owner knew of it, therefore was not answerable. So the Jury found for the defendant. The Judge said the poor man that was bit was a great sufferer, (as indeed he was, lying about a quarter of a year by it before he was fit to work again,) and ’twas pity but he should have relief if the law would give it him. But a man was not bound to repair a damage his dog by a bite, or his horse by a kick might do, unless he had been warn’d before that his beast was used to such ill tricks and he did not restrain him. ’Twas a bitch with puppies, and the man came near the kennel in which they were, otherwise ’twas proved she was very quiet. So the man could have no relief.”

Sir Robert Dormer was appointed a Justice of the Common Pleas, February 11th, 1705.

Sir John Fortescue Aland was appointed Solicitor-General to

George I. December 16th, 1715, a Baron of the Exchequer February 8th, 1717, a Justice of the King's Bench May 15th 1718, and a Justice of the Common Pleas January 23rd, 1729. He resigned in 1746, and was contemporaneously advanced to the Peerage of Ireland by the title of Baron Fortescue of Credan, an honour he did not live long to enjoy, dying at the close of the same year. He was a member of the illustrious family of Fortescue, but assumed for "golden reasons" the name of his maternal grandfather Henry Aland, from whom he inherited considerable estates in Ireland. He was the author of a volume of Reports, comprising cases both in the Chancery and Common Law Courts, and which are known as Fortescue's Reports.

At the Assizes held March 9th, 1719, the Judges were Barons Montague and Fortescue Aland. Upon this occasion, and for the first time, Mr. Welles (who appears to have warmed to his work as he proceeded) gives a brief note of the Judge's charge to the Grand Jury, which henceforth becomes a frequent custom with him. "Judge Fortescue," he says, "in his charge had several pretty observations upon our constitution. One was upon the original of Grand Jurys, which he thought might have their rise from our old Saxon Custom, when the Kingdom was divided into Tythings, of visiting the Chief man of every Tything (or Tything man) with an authority to enquire into the behaviour of the rest, and making all the Tything answerable for all felonies and crimes committed in the Tything if they did not find out the criminals. And in the room of this he conceives came afterwards our present mode of summoning some of the most considerable men of all the Hundreds in every County to enquire into and present offences against the Law."

That Judge Fortescue Aland was a sincere admirer of every thing Saxon, will be sufficiently apparent to every one who will take the trouble of reading the preface to his reports, choice morsels of which he was now and then in the habit of retailing to Grand Juries, as will hereafter appear. Speaking of the Common Law of England he there says, "He that will look into the Saxon Laws, and read them in their native tongue, will find as

clearly as can be the foundation and principal materials of this noble building." He strongly recommends the study of the language to lawyers, asserting that "the very elements and foundation of our laws are laid in this tongue;" and observes with respect to Law French, that some, not content to master that language for the sake of what is already written therein, "still persevere in writing new things in it," a practice which he strongly deprecates. He also mentions a case in which he was himself Counsel, by way of exemplifying the advantage to be derived by a practitioner from a competent knowledge of the Saxon language. It was an action upon a lease, wherein there was a reservation of rent half yearly at Rudmass-day. Court, Counsel, and Jury, he tells us, were alike perplexed. No man had heard of Saint Rudmass, nor was there such Saint to be found in the Calendar. "At last," says the learned Judge (who seems by the way to have had a tolerably good opinion of himself),¹ "it was unfolded by me that Rode signified a Cross, and Masseday or Messeday signified a feast day; then the matter was plain, the expression signifying Holy-Cross day, or the Feast of the Holy Cross, and the half yearly reservation at Rudmass day referred to the two feasts of the Holy Cross, the one whereof is the 3rd May, called the Invention of the Cross, and the other is the Exaltation of the Cross, which is the fourteenth day of September, and known to this day by all concerned about Venison by the name of Holyrood day."

We pause here, not because the subject is exhausted, nor because we have selected the most "telling" passages from the interesting manuscript before us, (we have in fact hitherto proceeded regularly page by page and entry by entry,) but simply from a sense of the impossibility of doing justice to Mr. Welles' recorded experiences, as a Gloucestershire Magistrate during a space of forty years, within the limits usually assigned to our articles. In fact, by far the more curious portions of his notes are

¹ Speaking of the Reports of the learned Judge in his "Reporters Chronologically Arranged," Wallace observes, "Justice Fortescue A., however, generally strikes you as the prominent person in the judicial cast; his opinion having apparently been written out with more care than those of his brethren."

as yet untouched upon. As we have already remarked, he warms with his work as it proceeds, his notes become more copious, his knowledge of his duties more accurate, and his powers of observation sharpened by practice. There still remains "much matter to be heard and learned;" and, in our next number, we propose to renew our consideration of the lifelike pictures of old times which he has bequeathed us.

ART. VIII.—THE EMPEROR OF AUSTRIA AND KING
OF HUNGARY, *v.* DAY AND KOSSUTH.

A CHANCERY suit is now pending between Francis Joseph, styling himself Emperor of Austria and King of Hungary and Bohemia, as plaintiff, and William Day, John Day, Joseph Day, and Louis Kossuth, as defendants. While we write, a motion stands over for argument to dissolve an injunction which has been granted *ex parte* to the plaintiff, and by which the Messrs. Day are restrained from printing, lithographing, or manufacturing, any documents purporting to be notes of the Hungarian State or nation, or notes with the royal arms of Hungary printed thereon; and from delivering to the defendant Kossuth, or parting with to any person, certain plates alleged to have been prepared by them for printing documents purporting to be such notes, or any documents printed or lithographed therefrom, or any documents in their possession purporting to be such notes. The bill further prays that the Messrs. Day may be decreed to deliver the said plates to the plaintiff, to be destroyed. Before these pages are in the hands of our readers, the fate of the motion we have mentioned will have been decided; but in the mean time, since, by granting an *ex parte* injunction, the learned vice-chancellor has commended the plaintiff's contention to the consideration of the profession as not only plausible, but *prima facie* correct, we have used the leisure of an Easter

vacation to follow out the course of study which has thus been authoritatively indicated to us, and with the result which we will now lay before the public. We have every confidence that the learned vice-chancellor will, on mature consideration, have arrived at the same conclusion; if not, we shall have performed our duty in chronicling and criticising what we must then believe to be a new development of law.

We just now mentioned the public, and certainly it is probable that, in a political case, we may have readers beyond the pale of the profession. There are occasions when the intrusion of such among the audience might embarrass, as it would be felt to render necessary tedious explanations of matters understood at once by the professional man. But this is not one of them. The most wonderful thing about the conduct of the plaintiff is the manner in which, by avoiding the positive assertion of any known head of equity jurisdiction, of any established doctrine on which a bill may be filed in the English court of chancery, and to which, when so filed, it may be referred by a single phrase, he has made it impossible to explain this bill even to a lawyer, without giving an account of it so detailed, that we verily hope its whole weakness will be made evident to all who may peruse our article. We call this the most wonderful thing about the conduct of the plaintiff, because it marks that quality of good faith for which his house has never been peculiarly distinguished. It would have been easy to throw in allegations, by which, till they were disproved by evidence, a case might have been made out, falling within some known equitable principle. But the plaintiff is in the hands of an English counsel, who has honestly stated the facts as he was informed of them, and boldly, nor without some measure of success, ventured thereupon into chancery.

The bill then begins with stating that "the plaintiff is the king of Hungary, and as such, in right of his crown, has the sole and exclusive privilege of authorizing the issue in Hungary of notes for payment of money, to be circulated in that country as money." *The king of Hungary!* Not ruler *de facto*, sovereign, or even simply king, but *the* king of Hungary! Most justly, so far as

concerns the propriety of the allegation, though with what justice as to the truth of facts we shall presently see; for there is a kingdom of Hungary known to our treaties, and therefore to our judges; and known to them, not as France, of which we recognise the executive power for the time being, but with especial reference to the question who shall be its king, a question on which we have contracted obligations. What in modern history were our first relations with that kingdom shall be told in the words of Bishop Burnet, in his "*History of his own Time*," at vol. ii. page 393 of the marginal division and paging. They occurred in the year 1704, while the emperor was allied with Queen Anne and other powers in the war of the Spanish succession.

"There were great errors in the government of that kingdom. By a long course of oppression and injustice, the Hungarians were grown savage and intractable; they saw they were both hated and despised by the Germans; the court of Vienna seemed to consider them as so many enemies, who were to be depressed in order to their being extirpated; upon any pretence of plots their persons were seized on, and their estates confiscated. The Jesuits were believed to have a great share in all those contrivances and prosecutions, and it was said that they purchased the confiscated estates upon very easy terms. The nobility of Hungary seemed irreconcilable to the court of Vienna. On the other hand, those of that court who had these confiscations assigned them, and knew that the restoring these would certainly be insisted on as a necessary article in any treaty that might follow, did all they could to obstruct such a treaty. Yet when the ministers of the allies pressed the opening a treaty with the malcontents, the emperor seemed willing to refer the arbitration of that matter to his allies; but, though it was thought fit to speak in that style, yet no such thing was designed. A treaty was opened, but when it was known that Zeiher had the chief management of it there was no reason to expect any good of it."

And no good came of that treaty, or of that imperial house. Yet when the emperor-king, being without male issue, had pub-

lished in 1713 an instrument, by which he introduced female succession into his archduchy of Austria, the Hungarian diet, in 1723, adopted this new rule of succession by a series of enactments, in one of which they "determine that such new rule shall be observed on every future occasion of a coronation, together with the chartered and other liberties and prerogatives of the estates and orders of the realm." And in another of them they declare, that "the successors so to be lawfully crowned shall inviolably preserve the same estates and orders in the same prerogatives, immunities, and laws." Now, it is just this with which an English judge has to do, if he has to do with the kingdom of Hungary at all; for it is just this which forms the base of our diplomatic relations with that country. The emperor, Charles the Sixth, King Charles the Third of Hungary, spent the remainder of his days in bargaining with the powers of Europe for their guarantee of the new rule of succession. On March 16, 1731, he succeeded in obtaining from Great Britain and the United Provinces what is known as the second treaty of Vienna, by the second article of which those states pledged themselves "to maintain, with all their forces, that order of succession by primogeniture in both sexes, which his imperial majesty had declared by the instrument of April 19, 1713, of which a copy was thereto annexed, and which, by the estates and orders of all the hereditary kingdoms and provinces of the house of Austria, had since been adopted, and placed with the force of law among the public archives as a Pragmatic Sanction, binding for ever." This was the Pragmatic Sanction which we guaranteed; not the mere instrument of 1713, but, for each crown-land of the house of Hapsburg, such a settlement as competent authority had placed among its records for a law; in Hungary, the settlement enacted in 1723, with its equal care for the succession of the sovereign and the liberties of the subject. The guarantee was renewed to the empress-queen, Maria Theresa, by the twenty-first article of the treaty of Aix-la-Chapelle in 1748, and remains to this day the foundation of our relations with Hungary.

Most wisely, then, does the plaintiff claim in an English court

to be "*the* King of Hungary," a person occupying a known and well-defined position in the system of European institutions, if in right of that country he can claim at all. The battle of Arad has not imposed the decrees of March, 1849, on a justice into whose scales the sword of Brennus has not yet been thrown. Sovereign by conquest, with unlimited right, he may have been, as for eleven years he claimed to be, from the Carpathians to the Adriatic. There his judges may have treated the name of kingdom as an unmeaning ornament, just as we speak of the principality of Wales, and have confessed that Hungary was a part of the empire of Austria, as the plaintiff had proclaimed it to be; though his ancestor, who gave its name to that empire on abdicating the crown of Germany, never pretended to include Hungary in it. But no British subject, whether at the bar or on the bench, can concede such a character to the plaintiff without tearing the second treaty of Vienna, and the treaty of Aix-la-Chapelle, through which he is to us a king by title-deed and settlement. No recognition which our government may have given to his tenure of Hungary since March, 1849, can alter this. Such a recognition may have an important bearing on the question, whether he is to us so much as a king by title-deed and settlement? But most assuredly, so long as the Queen of Great Britain and Ireland has not explicitly changed the base on which her friendship with him reposes, any diplomatic intercourse between her and the plaintiff must be referred to the title which her royal house has acknowledged and guaranteed in his.

We said that a recognition of the plaintiff's title by our executive might have an important bearing on the question, whether he is to us so much as a king by title-deed and settlement; for on the treaties themselves it could not be contended that we are bound to recognise any representative of the house of Hapsburg, who has not complied with all which the laws of Hungary make it necessary to comply with before any one can be king of that country. The obligation, we have shown, was to maintain an instrument which had been registered by the diet among the laws of the land; but nothing has ever been registered

by a Hungarian diet among the laws of that land, through which any one can style himself king of Hungary, or act as such, if within six months he do not submit himself to the rite of coronation, and solemnly swear to preserve the liberties of the nation. There is, indeed, something impressive in the manner in which the laws of Hungary speak of that rite. Sometimes it is the "inauguration," a classic term for the solemn entrance upon office of the first magistrate of a free people; inauguration or coronation, it is *suscienda*, a vow to be taken, a sacrament of righteous government to be received, a ceremony not to be sought for vain-glory, but to be undergone for duty. In the tedious pomp with which the Latin of these quaint laws winds through their labyrinthine sentences, and the stately adjectives and adverbs which hedge and encumber its progress, we at least see some reflection of the self-respect of this free and ancient people. We catch the shadow of a dignity, if from serious argument we may turn for a moment to criticism on style, not indeed of that highest dignity of human speech which would simply transmit the very thought as it is, because it recognises the thing which is as greater than all embellishments of it, but of that lower dignity which would embellish what it says, because it respects its words, and pardonably imagines that it testifies that respect by ornament. One son of Hapsburg shrank from the obligation thus imposed. And, consequently, "Joseph the second of Austria never was acknowledged as king of Hungary, and his name does not so much as appear either in the roll of the kings of Hungary, or in any act recorded in the duly authenticated books of the acts of the estates of Hungary, except in so far as it is expressly declared in the said acts that no *privilegia* concerning Hungary, which might have been pretended to be granted by the said Joseph the second of Austria, had any force or validity in Hungary, but that in every case it was necessary that fresh *privilegia* should be granted by a lawfully crowned king."—(*Kossuth's Affidavit*.) After this was passed the third article of the diet of 1790, which enacts that "on every transmission of the sovereignty, the lawful right of coronation shall

be undergone without fail within six months from the death of the deceased king, those hereditary rights of the king which pertain to the public administration of the realm, conformably to the constitution thereof, being saved *in the mean time* ;” but even from this six months’ saving there is excepted the bestowal of privileges, “which is to remain the exclusive prerogative of a lawfully crowned king.”

Upon this, not we, but the British government in 1849, might have built much. Francis Joseph was not crowned ; he never has been crowned. It is doubtful whether even he possessed, or yet possesses, the hereditary right to be crowned ; for his uncle, who abdicated, is still living, and the Hungarian laws make no provision for the case of abdication. Nor, if an abdication be admissible, is Francis Joseph the next heir ; for his father also is still living, and the case of renunciation by one who has never become king is equally unprovided for. If a precedent be sought in our own history, we have none for an abdication of the throne, but we have one for an abdication of the government, and that tells against the plaintiff. King James the Second abdicated, voluntarily abandoned, and rejected, with the strength of his will, the government of this country as by law established in king, lords, and commons ; and with the strength of a more righteous will than his, and with that of a yet more Righteous Will to back it, the nation rejected him from being king over them. Thirteen years ago the constitution of Hungary resembled that of England, in being the only other survivor of the limited monarchies of the middle ages ; and as Pitt proved that no Prince of Wales could be the heir of a living lunatic, so an English statesman might have held that in Hungary no Austrian archduke or emperor could be the heir of a living man. But though the treaties of 1731 and 1748 did not require it, the new emperor of Austria was recognised by the queen as king of Hungary, yet so recognised by virtue of the inchoate and seeming hereditary title which, had it been good and perfected, the treaties would have bound her to maintain. Such was the case in fact, because the recognition

was immediate, not waiting for the result of the war by which he became ruler of Hungary *de facto*, to which title a later recognition might have been referred; indeed, for many months after the queen had acknowledged him king of Hungary, the armies of that country, which he had presumptuously invaded, were more feared at Vienna than were his own at Debreczin; nor was it till a way had been made for him by foreign aid that he entered his new frontiers in person, and "inaugurated" his reign over Hungary, not by "the lawful rite of coronation," but by the ruins of her cities and the execution of her statesmen and generals. Such was the case in law, for to recognise a title, not at least supposed to be in accordance with the treaties, would have been a breach of them not in law to be presumed. What then remains but that, if an English judge must follow the lead of his government in acknowledging the plaintiff's title as king of Hungary, he must equally follow the lead of public acts in referring to the laws of Hungary to test those privileges and authorities which, as such king, the plaintiff may enjoy, in right of that for which, in contempt of the common facts of the day, he selects the name of "his crown."

We undertook to give an account of the bill, and this we will now proceed in doing, without waiting at present to examine whether the issue of notes is really a prerogative of the Hungarian crown, only requesting our readers to bear in mind the legal reflections we have made on the plaintiff's title. Next, the plaintiff asserts that, still in right of "his crown," he has "the sole and exclusive privilege of authorizing to be affixed to any document, intended to be published or circulated in Hungary, the royal arms of that country." Let this too pass for the moment in point of fact, for we wish to trace the equity, if any, relied on. It will be found, if we are not mistaken, that in its devious course the bill glances at several doctrines of equity, wooing each of them in turn for a little countenance, but ending with the imperial *sic volo sic jubeo* of a prayer which does not accurately correspond with any. This first allusion the skilful draftsman, for it is perhaps the most catching point of his case,

aims obviously at the doctrine of trade marks. We must inform laymen, that the court of chancery will grant an injunction against the fraudulent assumption of a trade mark, which the just reputation of his goods has made valuable to a manufacturer. The fraud, it has been repeatedly laid down, is the essence of the case: indeed, if it were not, chancery could not interfere at all, since there is no statute creating any right in a trade mark, nor in fact does any such right exist independent of the operation of the courts on the ground of fraud. Farther, it is implied in this, that the assumption restrained by the injunction is in breach of some pecuniary interest enjoyed through the use of the trade mark; for however widely courts of equity may have extended the meaning of fraud, they have never yet made it synonymous with wrong-doing, or so widely departed from the queen's English as to imagine that there can be fraud when no one is defrauded of any thing. Indeed, it may be said with truth, that equity is exclusively concerned with value, though so wide a proposition is not necessary to this matter of trade marks. When it interferes to preserve a specific chattel, as in the case of the horn of Pusey or the Northumbrian altar, it does so, not on the ground that the article does not come within the category of value, but that its value is not calculable by ordinary measures; not that it is priceless, in any but that inaccurate sense which is better expressed by saying that its price is a *prix d'affection*: for, being property, the article must have value. When equity restrains a nuisance, it restrains an act which possibly may not impair the selling price of any property, as we can imagine the establishment of a most offensive manufacture to augment the price at which a neighbouring field may be sold for building land; but it restrains an interference with the neighbouring owner's proprietary right to use his field in whatever innocent manner he pleases, though such manner may not be the most lucrative; and every proprietary right is, as such, of value. In a highly illustrative case, chancery refused to restrain a vender of quack medicine from puffing his pills under the name of the late Sir James Clark,

because that eminent physician was not himself a vender of pills, which might be depreciated by such an abuse of his reputation, and it could not take upon itself the charge of his reputation except so far as it was of value.

Now let us see how far the plaintiff has, on his own showing, a right of trade mark in the use of the royal arms of Hungary, which the court of chancery will protect. The bill does not allege that the exclusive right to use these arms ever was, or could be, of the smallest value to the plaintiff. It contains no statement whatever, nor even an insinuation, if an insinuation would be sufficient, in any way connecting, or attempting to connect, the idea of value or property with these arms. It does not say or insinuate that any of the defendants has by any fraud or contrivance diverted, or does by any fraud or contrivance intend to divert, any custom or profit from the royal firm or treasury. On the contrary, the allegations of the bill conspire with its omissions to exclude the ground of fraud with regard to the use of these arms, for it pretends a legal right in the plaintiff, and an open breach of it by the defendants. The case made, then, is no better than if an English gentleman should seek by proceedings in chancery to restrain the publican of the next village from displaying his arms on a sign-board.

After having hinted a right of trade-mark in the use of the royal arms, the bill proceeds to found something on the alleged exclusive privilege of authorizing the issue, in Hungary, of notes for the payment of money, to be circulated in that country. What it is which is sought to be founded thereon, we will let our readers infer from the plaintiff's words:—"Nearly the whole of the circulation of Hungary consists of notes of the National Bank of Austria, which are issued under the authority of the plaintiff, and circulate in Hungary as money." "Messrs. Day & Sons, by the direction of Louis Kossuth, have prepared plates for printing documents which purport to be notes of the Hungarian nation or state, for various sums of money, and which are designed to be circulated as money in the kingdom of Hungary, and are now engaged in printing from the plates so prepared by them docu-

ments which purport to be such notes as aforesaid, and which, for the sake of distinction, are hereafter called 'the spurious notes.' " "For the sake of distinction" is an important qualification, due to the draftsman's candour, though not one which goes at all beyond what the facts of the case required. The notes are not alleged in the bill to be counterfeits of any Austrian or other notes actually circulating in Hungary, nor are they such in fact, there being no similarity between them and those of the National Bank of Austria; indeed they are openly signed, "In the name of the nation, Kossuth Louis." The use of the word "spurious" might therefore have carried with it some advantage, since it would not perhaps have occurred to all that, had there been a possibility of representing the notes as counterfeits, the bill would have distinctly put that point in issue; but the advantage of the implication is properly foregone, by the warning to the reader that the opprobrious term is used only for the sake of distinction. "The said Louis Kossuth intends, as soon as he receives the said spurious notes, without any authority from and against the will of the plaintiff, to send the said spurious notes to Hungary, and to sell some of them, for divers sums of money, to such of the plaintiff's subjects and others resident there, as may be willing to take the same, and by this and other means to introduce the same into circulation in Hungary; and the introduction of the said notes into Hungary will create a spurious circulation there, and by that and other means cause great detriment to the subjects of the plaintiff." Astonishing fact! We can, however, parallel its main features; for the manufacturers and merchants of this country have debtors in all parts of the world, and even some in the plaintiff's dominions; though, in consequence of the plaintiff's anti-commercial policy, by no means as many there as we could desire. Now, divers of these debtors intend to send bills of exchange and promissory notes into England, and to sell some of them to such of the queen's subjects and others resident there as may be willing to take the same, and by this and other means to introduce the same into circulation in England; and the introduction of the said bills and notes into England will

create a circulation there which we may be allowed to call spurious, inasmuch as we believe that some of them will never be paid, which can scarcely be said of the defendant Kossuth's notes, supposing them ever to get into circulation in Hungary; since, not believing the plaintiff to rule over an ignorant or stupid people, we do not imagine that many would be found to take notes issued in the name of the nation, unless a government were already established which had adopted them.

So much for the fact of the detriment which is threatened to the subjects of the plaintiff; but, were ever so much detriment to be reasonably apprehended for any number of those subjects, there is no authority, from precedent or principle, on which, for the purpose of a suit in chancery, a sovereign can assume to represent the collective grievances of individuals casually connected by a common wrong, but not standing towards each other in any corporate or permanent relation. The only instances in which sovereigns have been suitors in our courts have occurred where some pecuniary right of themselves or of the state, some interest of the public treasury or privy purse, was the subject of claim. Every such interest, vested in friendly, though foreign, hands, commands the protection of English tribunals. It would be unjust and intolerable to refuse an emperor his rights of property as a man; it would be equally so to refuse its rights of property, as a corporation, to that sovereign corporation called a state. But there is no analogy of domestic law on which an emperor can seek a civil remedy for a mischief without asserting that some pecuniary interest is within the mischief which either belongs to him, or which, like the national treasury, he regularly administers, so that he can claim to represent it independently of the mischief and the remedy, and therefore without a *petitio principii*. An information by the attorney-general presents no such analogy; for to protect the queen's subjects in general is of course a part of the ordinary duty of the queen's courts, and the attorney-general is an officer appointed, among other purposes, for that of assisting the courts in the execution of that duty. To liken the emperor to that officer would be to assume the main

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ments which purport to be such notes as aforesaid for the sake of distinction, are hereafter called "the "For the sake of distinction" is an important to the draftsman's candour, though not one beyond what the facts of the case required, alleged in the bill to be counterfeits of any notes actually circulating in Hungary, nor are there being no similarity between them and the Bank of Austria; indeed they are openly signed of the nation, Kossuth Louis." The use of this might therefore have carried with it some advantage not perhaps have occurred to all that, had ability of representing the notes as counterfeits, distinctly put that point in issue; but the advantage is properly foregone, by the warning to opprobrious term is used only for the sake of said Louis Kossuth intends, as soon as he spurious notes, without any authority from of the plaintiff, to send the said spurious notes to sell some of them, for divers sums of money to plaintiff's subjects and others resident there, take the same, and by this and other means same into circulation in Hungary; and the said notes into Hungary will create a spurious and by that and other means cause great injury to the subjects of the plaintiff." Astonishing fact parallel its main features; for the manufacturers of this country have debtors in all parts some in the plaintiff's dominions; therefore plaintiff's anti-commercial policy, by we could desire. The delivery of bills of exchange and the mission of some of the agents of the

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point which has to be proved ; namely, that such a general duty of protection, beyond that of redressing the specific complaints of injured persons, lies upon the queen's courts on behalf of foreigners resident abroad. Grant this, and it will follow by an easy chain of reasoning—first, that there must be some person to prompt the court to the performance of such a duty—next, that that person can be no other than the foreign sovereign. But what argument can palliate the absurdity of throwing such a duty on our chancellor as to persons whose circumstances he cannot know, and whose well-being is at most in certain cases, and incidentally, the object of that justice which the queen, in whose name he sits, is bound to administer? When, too, the functionary, at whose instance he would have to act, is an officer neither of chancery nor of this country, and over whom, if he chose to use the ample opportunities so afforded him to mislead the court or to oppress the lieges, no British control would exist, certainly no control of British authority, even, we fear, but little influence of British opinion. Have we ever claimed the converse right for ourselves? Was it ever seen that an English attorney-general sued, in Austria or France, to extend the restraining arm of England to acts done upon a foreign soil, on the ground of their possible consequences here? We are as superior to the spirit of encroachment which would desire it, as we are to the spirit of fear which would make it seem to be desirable.

But besides these objections, which lie to the representative capacity sought to be assumed by the plaintiff, there are others no less formidable in the nature of the grievance, unreal as it is, which he seeks to represent. While the bill glanced at trade marks, it hinted an equity which did not reside in the facts; the present resides as little in the doctrines of the court as in the facts or the character. If for a moment we grant the plaintiff that he may collect in his person the scattered grievances of a few score of weak Hungarians, yet what grievance, cognisable in the court of Chancery, does he point out in the allegations we are considering? Detriment to individual Hungarians may be caused in many innocent ways. Where does this way fail of innocence?

Here is a promise made open and above board by Louis Kossuth, as in the name of the nation, to pay money. There is no technical fraud in that, even supposing he should never be able to pay it. No injunction will be granted to restrain you from making a promise which you cannot keep; as, for instance, that your pills shall cure, or the horse you sell be sound. But the notes are to be introduced against the will of the plaintiff. Very well; we will consider presently how far that allegation may avail for another purpose—at least, it furnishes no element either of technical or moral fraud to the detriment which is to happen to the Hungarians. We must repeat what we have had occasion to say before, that wrongdoing is one idea, fraud another, and a narrower one. Why, if goods are prepared abroad for the purpose of being smuggled into this country, it is intended to introduce them into the united kingdom without authority from and against the will of her majesty, and such introduction may cause great detriment to the fair traders among her people. But shall we therefore send the attorney-general abroad to obtain a judicial prohibition? or would it be granted if we did?

We have seen what, according to the plaintiff, the defendant Kossuth intends to do with "some of the notes," which are to be introduced into Hungary, with those namely which he intends to sell there for divers sums of money. Now, let us see to what use he means to put the rest. "He intends to use the remainder of such notes for other purposes in Hungary, in violation of the rights and prerogative of the plaintiff as king of that country; and, amongst other purposes, for the promotion of revolution and discord there. And the introduction of the said notes into Hungary will, by that and other means, cause great detriment to the state." The original here adds, "and to the subjects of the plaintiff." But we have already introduced these words, as well as the mention of the spurious circulation, into our previous citation of the same clause, while, on the other hand, we omitted the detriment to the state. In so distributing the matter of a clause which occurs, once for all, after the allegations relating as well to the notes to be sold as to the remainder of the notes, we

believe that we have truly represented the meaning desired to be conveyed. *Reddendo singula singulis*, it is natural to suppose that the detriment to the state is apprehended from the notes which are intended to be used for violating the king's rights and promoting revolution, an allegation which is not made concerning the notes to be sold; and the detriment to individuals from the notes intended to be sold to them, which are expressly excepted from the category of those to be used for violating the king's rights and promoting revolution. Besides which, the notes which are not to be sold can hardly be employed in creating a spurious circulation. But, if any one thinks that he can eke out the case which we have already discussed, about the notes to be sold, by adducing detriment to the state,—even in which case, however, we beg him to observe that he must not think of loss to the public treasury, which is not mentioned in the bill,—or that he can eke out the case which we are now going to discuss, about “the remainder of the notes,” by adducing detriment to individuals, we here present him with the clause in its entirety: “and the introduction of the said notes into Hungary will create a spurious circulation there, and by that and other means cause great detriment to the state and to the subjects of the plaintiff.”

With this explanation, we shall proceed to the case of “the remainder of the notes.” Now, it is by no means obvious to us in what way these are to accomplish the dire purposes for which the defendant, Kossuth, is said to have stored his armoury with them. We could have understood how, if these notes were brought into circulation in Hungary before the establishment of a government which had adopted them, and if any considerable number of persons could then be found to furnish ready money, or stores and munitions of war, in return for such questionable paper, they might be of service in the attempt to establish a government which should adopt them. But that would be selling the notes, and we are now dealing with the remainder, after deducting those to be sold. What new weapon, then, of revolution is this? which, from that strange hiding-place for a promissory note, though unquestionably the safest for the promiser, his own pocket, is

with a magic spell to cut away its supports from the uneasy throne of Francis Joseph ! We are beaten—we give it up ; but, in the plentitude of faith, we will assume that “ the remainder of the notes ” may have so potent an operation, because we are now anxious to arrive at what seems to us the most interesting question raised by the bill, the extent to which, and the circumstances in which, our law will interfere for the repression of revolution in foreign countries. In order that we may not preclude ourselves from this, we will postpone a reflection which rises to our lips, that any attempt to revolutionise a foreign country must, if and when illegal, be purely a criminal act, and therefore no subject of chancery jurisdiction. Let that pass now, for common law dicta are to be found in the books, to which the present seems an appropriate occasion for calling attention, and the vagueness of which may probably have created in the plaintiff’s advisers some opinion that Messrs. Day and Mr. Kossuth had been violating the laws of England, though it could not have persuaded experienced chancery lawyers that therefore it was necessarily cognisable in their court.

The most pointed statements with which we are acquainted on the extent to which English law will protect foreign governments, are to be found in the 124th volume of Hansard, columns 1047 and following. In introducing the subject of the foreign refugees to the attention of their lordships, on March 4th, 1853, Lord Lyndhurst said—“ If a number of British subjects were to combine and conspire together to excite revolt among the inhabitants of a friendly state, of a state united in alliance with us, and these persons, in pursuance of that conspiracy, were to issue manifestoes and proclamations for the purpose of carrying that object into effect ; above all, if they were to subscribe money for the purpose of purchasing arms to give effect to that intended enterprise, I conceive, and I state with confidence, that such persons would be guilty of a misdemeanour, and liable to suffer punishment by the laws of this country, inasmuch as their conduct would tend to embroil the two countries together, to lead to remonstrances by the one with the other, and ulti-

mately, it might be, to war." Lord Brougham added—"That the law of this country, as it at present stood, was amply sufficient to visit with severe punishment not only all conspiracies such as his noble and learned friend had described, but lesser attempts against the majesties or constitutions of foreign nations; he meant even libels against the persons of those sovereigns or authorities." Lord Truro followed with the statement—"That the existing common law of England is fully sufficient to punish individuals, whether refugees or British subjects, who should adopt any conduct in England calculated to give just offence to foreign powers in amity with this country, and to excite them to hostilities against us; and equally to punish those, who should excite or endeavour to promote revolution and rebellion by the subjects of those powers." Finally, Lord Cranworth, then lord chancellor, said, that—"The reason why libellers in such cases were prosecuted, was not simply on the ground of their having libelled foreign sovereigns, but because such libels were calculated to create a hostile feeling in foreign states, and to cause a breach of the peace between this country and those foreign powers."

We believe that the noble and learned lords whom we have quoted, would have themselves discountenanced any opinion that their sentiments on this occasion deserved less weight as being extrajudicial. No occasion can be imagined on which a stronger obligation could lie on the speakers not to overstate the law; for the statements made were avowedly intended to assure the governments and people of foreign nations that the law of this country needed neither amendment nor legislative confirmation, in order to furnish to them that protection against a hostile use of our soil which the speakers themselves admitted their right to claim, and any exaggeration of the protection actually furnished would therefore have been a breach of faith. Whatever was said by him on March 4th, 1853, each of those learned lords would, beyond question, have applied, if need had been, on the bench. Nor have we the desire, as after such authoritative declarations we certainly should want the power, to dispute any.

legal proposition then so laid down. Yet no one can read the speeches consecutively, as they were delivered, without being struck by a certain *crescendo* in the tone, which will remind him how ill a public assembly is fitted for the discussion of questions of positive law, how lightly it is safest to glance at them even on those indispensable occasions when some mention of them cannot be avoided. Beginning, in the language of the Nestor of the house, with a conspiracy to excite revolt among the inhabitants of a friendly state, we rise, through lesser attempts against its majesty or constitution, to any conduct calculated to give it just offence.

This is positive law, and, in its widest statement, the reservation that the offence must be just, saves all that the most ardent lover of liberty could desire. But, parallel to the climax of law, there runs a *crescendo* of reasoning, of which the keynote is the danger that war might ensue from the acts condemned as criminal; but which, after being first applied to the definite case of a conspiracy to excite revolt, is next extended to any conduct which might excite foreign powers to hostilities, almost as if this were another case in addition to that of just offence, and finishes by being assigned (so at least we understand Lord Cranworth) as *the* reason for the criminality of libels on foreign sovereigns, which, it appears to be said, would not otherwise be punishable. We confess that we should entertain great fears as to what, under certain political influences, or under certain conditions of popular excitement, might be held to be criminal—if, by any implication, the judges could arrogate to themselves the power of pronouncing on the probability that an act might lead to hostilities, and, on the ground of such probability, of condemning it. We confess that we cannot think ourselves safe unless the criminality of acts is determined by referring them to known categories; and we think it farther not too much to expect, that if one such category is to be formed by the giving just cause of offence to a foreign state in amity with the queen, there shall be some understanding as to what may constitute the justice of the offence—some line traced, *florente republicâ*, which may prevent

the judgment on that question from being swayed by the fear or passion of the day.

We have turned from Hansard to the case of Vint, Ross, and Parry, in the 27th volume of Howell's State Trials, and to that of Peltier in the 28th; and we say at once that the informations give us all the security we can desire. That against the three former misdemeanants charged them with "wrongfully and maliciously contriving and intending, as much as in them lay, to interrupt, disturb, and destroy the friendship, good-will, and harmony subsisting between our sovereign lord the king and his imperial majesty of Russia, and their respective subjects." That against Peltier charged him with "unlawfully and maliciously devising and intending to bring Napoleon Buonaparte into great hatred and contempt among the citizens of the French republic, and to excite and provoke them, by force of arms, to deprive him of his consular office and magistracy, and to kill and destroy him; and also unlawfully and maliciously devising, as much as in him lay, to interrupt, disturb, and destroy the friendship and peace subsisting between our lord the king and his subjects and the said Napoleon Buonaparte, the French republic, and the citizens of the same." Between the intent to disturb the peace, and the possibility, or even probability, that it may be disturbed, the difference is wide indeed; and no rule of law can any where be found which dispenses the jury, on such informations as these, from the duty of finding whether the party accused has been guilty of the very offence laid to his charge, or entitles them to substitute another for it. "I lay it down as law," said Lord Ellenborough in summing up the evidence against Peltier, "that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel, and particularly where it has a tendency to interrupt the pacific relations between the two countries." Assuredly it may, and the test of whether, in the particular case, it ought, is the conclusion to which the jury may come as to the intention of the asserted libeller. The intention wantonly to libel a foreign sovereign will be criminal.

even if it be accompanied by no intention to disturb the peace. That is so clear that we thought it superfluous to cite those parts of the two informations which merely turned upon the contrivance to traduce, defame, and vilify. But if there be no contrivance wantonly to libel, then the case cannot be eked out by the chance of offence, unless there have been the desire to create that offence, with its consequent embroilment. It is no libel by the law of this land to utter truth for the public benefit. It is greatly for the public benefit to utter truth, to state facts and offer sound reflections, on what passes abroad; because, where our people cannot choose but form an opinion, from the wide circulation of news on all subjects, domestic and foreign, it is of national concern that they should form a right opinion, else their principles might first be warped by the habit of wrongly judging foreign events, and then our own institutions might suffer from the bias they had contracted. If, therefore, such statements and reflections be presented in no spirit of wanton defamation, nor with any design of provoking hostilities, we can inquire no farther. We cannot make the protection of an English subject depend on the sting which his words may carry, where truth may be itself the most poignant sting. The intention to interrupt the pacific relations is not a phrase thrown in for ornament in drawing up the information, but a substantive accusation on which the jury must pass.

We hope that we have shown the categories to which offences in the nature of libels against foreign sovereigns must be referred; nor do we think that there is any greater difficulty in assigning their category to those offences, of which exciting the subjects of foreign sovereigns to revolt is the type. As between sovereign and subject we are quite neutral in idea, neutral almost in fact. We recognise the relations of peace as subsisting between soil and soil, and cannot suffer the soil of these islands to be used for the immediate purpose of carrying fire and sword upon foreign territory. In whose interest they may be carried there, is of no consequence. The foreign enlistment act, speaking in the sense of the ancient national policy, forbids enlistment in

the interest of sovereigns no less than in that of insurgents. In its principle, this is equal ; in its operation it may seem to lean a little towards the side of the foreign sovereign, who has his own territory on which to prepare his armaments, rather than to that of the insurgent, who, if he has not our territory, may have none. Possibly, in truth, it is not so ; possibly, if a government is bad, the time which it may thus gain to fill up the measure of its follies may be purchased dearly by the exceeding hopelessness of its case when the day of account shall come. But to whichever side the operation of the principle may lean, it is not from a contemplation of benefit to either side that it has been adopted. The name of order is prostituted when it is contrasted with that of liberty, which can alone be the foundation of any order consistent with the vitality of the human faculties ; but there is a truth and greatness in the idea of order, nevertheless. It is the opposite of brute force brutally employed, and though it may call in force to give the finishing stroke to an expiring system of misgovernment, it can only do so in virtue of some moral superiority in those who so employ it, by which they know that they can control the agency they have evoked, and supply with something better the place they have made vacant. Whether such a moral superiority exists in any case we cannot judge for other nations ; and therefore order takes to us the form of peace, which shall preclude the realm from being made an immediate base for *voies de fait*, for the exercise of any violence at a foreign spot. Even technically, peace is not only with the foreign sovereign, but with his subjects. We infer that, as the mere intent to aid a continental potentate in obtaining a larger measure of authority over his people would not be contrary to our peace with them, so neither is that to aid his people in curtailing that authority contrary to our peace with him. Farther, that as no overt act proceeding from such an intent would be criminal, for the only reason that, on some question which might be disputed between prince and people, it might excite hostile feelings in the mind of the people, by indicating an adoption of the side of the prince ; so no overt act proceeding

from such an intent can be criminal, for the only reason that, on such a question, it might excite hostile feelings in the mind of the prince, by indicating an adoption of the side of the people. Lastly, that the intent "to promote revolution" abroad, for here again we come in contact with the bill, can only be criminal or illegal when connected with the use of the realm as an immediate base, arsenal, and fortress for the exercise of violence on foreign soil.

Now, the bill contains no allegation that any conspiracy exists to use violence on the soil of Hungary, or to excite the people of Hungary to revolt, except so far as that is implied in the intention attributed to Mr. Kossuth, to "use the remainder of the notes for the promotion of revolution and disorder there;" and in the averment, that "the defendants, constituting the firm of Messrs. Day & Sons, before they prepared the plates for the said documents, were aware of the purpose for which the said Louis Kossuth intended to use the same; and that he was not authorized by the plaintiff to prepare or issue the same; and that the said documents were in violation of the rights of the plaintiff as king of Hungary." The affidavit of the Austrian ambassador, on which the *ex parte* injunction was granted, follows, as usual, the terms of the bill. Like it, it expressly asserts no conspiracy, and throws no light on the mystery of the method by which the notes are to be made efficacious in promoting revolution and disorder. It does not even enable the court to judge of the probability of the assertion that revolution and disorder are designed, by naming the person on whose information the deponent's belief in that design is founded, or even by stating what it was that the defendant heard from which he drew the conclusion, or, least of all, by adducing any collateral circumstances which might render the conclusion probable; unless, indeed, the alleged fact that the notes are a violation of the plaintiff's rights as king of Hungary can be supposed to have been intended as such a circumstance, and it would be a very strong conclusion to draw upon any, not to say upon an *ex parte* application, that an act, because illegal, must be done in contempla-

tion of armed rebellion. How different is this from the ordinary course of proceedings on such applications, in which the plaintiff who seeks to restrain a threatened wrong informs the court exactly of what has come to his own knowledge, of the terms and occasion of the threats used, of the steps which have been taken to carry out the meditated fraud, of every thing which can aid the court in judging of the reality and urgency of the danger! The whole deposition of the ambassador on this point reads to us like a tissue of surmises; and if the information which he professes to have received as ambassador be any thing more than the reflection of his own surmises from a distance, we must, at least, express our wonder that its substantiality was so apparent to the learned vice-chancellor, that he did not think it necessary to await its being tested and sifted by the evidence which the defendants might be able to adduce.

But let us examine the character filled by the sole witness, the meagreness of whose testimony we have exposed. He is the ambassador of the plaintiff, identified therefore with him in interest, identified with him in having to represent his person in this country. His credibility on the present occasion is, then, no other than that of the plaintiff; the affidavit is, in fact, that of the plaintiff made through his mouth. If there be any dispute upon the question who has the right to sign notes in the name of the nation, which the plaintiff shows upon the face of his bill that there is—for the very ground of his complaint is that that right is claimed and exercised by Louis Kossuth—then the testimony of the servant upon that question is the testimony of the master. When the witness has told us his name and position, we have no need to look at his affidavit; for, having read the bill, we know that we shall find there that “his imperial majesty is also king of Hungary, and as such, he has, in right of his crown, the sole and exclusive privilege of issuing, and of authorising the issue, in Hungary, of notes for payment of money intended to be circulated in that country as money; and also the sole and exclusive privilege of authorising to be affixed, to any document intended to be published or circulated in Hungary,

the royal arms of that country." Similarly, on the question of the purpose for which any of the notes are to be used, the opinion of the servant, for we have shown that he gives us no more, is the opinion of the master. And upon these two points hangs all the bill, even on the first of them alone; for, if the notes are not against Hungarian law, there is not, as the case was put before the court, so much as a foundation laid for the surmise of an intent to promote revolution and disorder.

Now let us hear what Lord Stowell, a great judge, and one whose political opinions did not lean to the popular side against that of authority, thought of the credibility of a sovereign deposing to his own rights. The passage occurs in the judgment on the *Twee Gebroeders*, in the third volume of Dr. Christopher Robinson's reports, page 338—"Something has been said in argument of the reverence due to the assertion of princes whose claim is advanced, and this court is disposed to pay the fullest measure of reverence which the case will allow. It is not improper to remark, that it is a question discussed much at length by foreign writers on general law, in what cases the sole assertion of princes is to be taken as conclusive legal proof; and no principle is more universally established among them, than that the mere assertion is not to be received as full and complete proof, or, as Farrinaceus expresses it, *Assertioni principis non statur quando agitur de causa propria ipsius principis, vel de ejus commodo aut interesse*; and indeed a contrary rule would carry the reverence due to these august personages to an extravagance that derided all reason and justice." If such was Lord Stowell's opinion of this kind of evidence, on the hearing of a cause at which all parties are represented, what would he have said of stopping the occupation of a tradesman behind his back, in obedience to a foreign right so deposed to?

But we believe it has been said that the right needed no deposition to support it; that the issue of paper money is *prima facie* a prerogative of sovereignty. So little, however, is this the case, that in our own country the issue of paper money is regulated by act of parliament, and has always been so regulated so far as

it has not been left entirely free, the crown never having had any prerogative on the subject. Indeed, an equivocation lies in the very words, when any prerogative is said to belong *prima facie* to sovereignty. Is the sovereignty meant that of the state, or of a so-called sovereign person in the state? In the former case there is no room for talking of *prima facie* rights; for the mutual rights and duties of states which acknowledge each other's independence are well known, each being absolute within its own limits to regulate or to leave unfettered any matter of domestic concern. But that is not the case here; for it is not the right of the kingdom of Hungary against that of Great Britain and Ireland which is put in issue by the bill, except with regard to its right of protection from hostile attempts, which may be intimated where the promotion of revolution and disorder is mentioned; in this matter of the right to issue paper money and to use the royal arms, it is the right, internal to Hungary, of the plaintiff against the defendant Kossuth and other Hungarians, which is, and must have been, put in issue. The two points must for ever remain distinct, though, as we have already pointed out, the one, if established, might be made use of as an argument on the other. To repress the design of promoting disorder, a claim may be made on the judiciary of this country, though not in chancery nor by the plaintiff, yet by information of the attorney-general, and in the name of the peace which subsists between us and Hungary. The design of promoting disorder, deposed to merely as the belief of a deponent who vouchsafes no revelation as to the reason of his belief, may yet, in the mind of one already half convinced, receive some countenance from the violation by Hungarians of prerogatives belonging as against them to the plaintiff, as a particular, though exalted, Hungarian functionary. But those prerogatives can never, in themselves, be connected with any rights of Hungary against the united kingdom. Now, with regard to the prerogatives of a so-called sovereign person in a state as against the individual subjects of that state, there can be no *prima facie* assumption, not, as in the international case, because the rights are too well defined, but because they are essentially dependent

on the law of the particular state, and may vary, and do vary, from those of an autocratic emperor to those of a Venetian doge.

They must be proved by evidence ; and let us hear now what Lord Stowell, in the case just cited, said as to their proof, when prerogatives or powers of a very absolute kind are asserted. " But there is evidence of an historical nature offered of two kinds ; first, there is an asserted grant to the emperor as a common sovereign in 1454 ; and, secondly, the exercise of dominion. On the grant, two things are to be ascertained ; first, the authority ; and, secondly, the effect. It would ill become this court to question the extent of imperial rights ; but it is not too much to say that the carving out a common river, even in the interior of Germany, into private and exclusive possessions, is a very high act of prerogative ; and it is not shown by any German jurist of authority, that the relation which the emperor, as head of that feudal confederacy, bears to its members, and which has been very different at different periods, did at any time, or particularly at the time in question, invest him with any such prerogative. No one can say that a foreign court might not, without any immodesty or irreverence, desire some information respecting the constitutional validity of such a grant—a grant which opposes all common principle, and which represents the whole German empire, a free constitution as it fundamentally is, subject to as capricious a state of dependence on its chief as can possibly be described." If such was Lord Stowell's opinion of the delicacy of proving high prerogatives strange to our own laws, when asserted to exist in countries known by notorious history to have free constitutions, what would he have said of stopping the occupation of a tradesman behind his back, in obedience to such a prerogative asserted in a country known to us by treaty as well as by history to have a free constitution, and so asserted only upon such evidence as we have already seen him characterising ?

We do not intend to go into the evidence which we understand has since been filed in this cause, because it is the *ex parte* injunction, granted on what appears to us a demurrable bill, on which we have thought it our duty to comment. But, in order

to illustrate the necessity of caution in relying on such an affidavit as that of the ambassador, we will mention that we understand it: First, to have been since admitted on the plaintiff's part that the king of Hungary has not, without the concurrence of the diet, any authority to issue paper money which shall be a legal tender as between private persons: Secondly, to be not proven that the charter of the National Bank of Austria has any legal validity in Hungary; but that there is, on the contrary, strong reason for believing that its notes circulated there before 1848 only as those of any other corporation or person lawfully might, having been at par: Thirdly, to be clearly proven that the royal arms of Hungary are habitually used there, without any licence from the plaintiff, on newspapers, shop-fronts, wine-bottles, and in other miscellaneous ways.

We have followed the bill point by point; but we must, before we conclude, bring together the legal principles which we have been thus led to enunciate, together with some others which are pertinent to the case as a whole.

Property, acquired within the dominion of a foreign law, is respected when the subject of it is brought into this country; contracts, concluded within the dominion of a foreign law, are enforced in this country; some kinds of status, as that resulting from marriage, when acquired abroad, are recognised here. In all these cases the foreign law is considered, for the purpose of appreciating the juristic effect of the foreign facts, whether such facts be set up as amounting to the transfer of property, the imposition of an obligation, or the creation of status. It is introduced mediately, in order that persons or things within our jurisdiction, but whose legal attributes, if any, have been acquired elsewhere, may not be left unclothed with legal attributes, which they could not be unless we barbarously dissociated ourselves from mankind. There is no instance in the books, nor any principle in the jurists upon which such an instance might be founded, of a foreign law applied otherwise than herein mentioned; applied, that is, primarily to test the rightfulness of an English fact. We have heard *Pisani v. Lawson*, 6 Bing N. C.

90, cited in proof that the English courts will enforce foreign rights in other circumstances than those here laid down. The objector, however, should avoid the equivocation in the word "right," and ask himself what "law" was there enforced. The point of that case is that an alien friend, though residing abroad, may sue here for a libel. But that is merely saying that the law of England prohibits its subjects from libelling alien friends. The so-called right of a foreigner to a good character, which it has been said that our courts recognise because it is founded in the law of nature, may be considered in two points of view, in one of which it is the result, and in the other the remote cause, of the action for libel in question. That name may be given to the motive for which the law of England prohibits its subjects from libelling alien friends, or it may be given to the advantageous position in which the foreigner stands in consequence of such prohibition. We give him the action for libel because we think he ought to have protection for his character, and he enjoys protection for his character because we give him the action for libel; and in either sense the word "right" is frequently used. But the immediate cause of his having the action is that our law, for whatever motive, actually gives him protection for his character.

A crucial case is furnished by a foreign law of copyright. Such a law invests no person or thing with any attribute which, we do not say may, but which can, accompany that person or thing into this country. No transportable thing is the subject of the so-called right created by such a law. Considering the right as we are now, apart from any violation of the law which may have been committed in the country where it exists, and through which a right, properly so called, may have become fixed against a particular person, it is merely another name for the advantage which results to one man from the legal prohibition which restrains all other men from publishing a certain book. Accordingly, it has been held that such legal prohibition must be limited to the territory of the prohibiting law; in other words, that the foreign copyright cannot be recognised here: *Jefferys v. Boosey*, 4 House of Lords' Cases, 815,975. If this were not so

an English author might sue in the United States, where the same principles of private international jurisprudence are received as with us, to restrain the printing of books intended to be introduced into England contrary to his copyright.

The injunction granted to the Emperor is extremely similar to the absurd one just suggested. Its sole foundation is in alleged Hungarian law, yet it restrains the conduct in England of defendants whom the bill does not attempt to connect with any Hungarian fact. It proceeds upon an alleged exclusive right to issue paper money and use the royal arms, which, if it exists, must be the creature of prohibitory laws addressed by Hungarian authority to all other men but the plaintiff, and which must be as restricted in their force territorially as the analogous prohibitions which constitute a foreign copyright. The case is absolutely without support from that of an injunction granted against the fraudulent appropriation or counterfeit of a foreign trade mark ; for such an injunction is independent of the question whether the foreigner is entitled to protection for his trade mark in his own country, and proceeds only on the ground of the fraud which has been committed in this country, by the attempt to divert custom through misrepresentation, which fraud is prohibited by the law of this country precisely as the libelling an alien friend is prohibited by it.—See *Collins Company v. Brown*, 3 K. & J. 423 ; *Collins Company v. Cowen*, 3 K. & J. 428.

The only case made in this bill of infraction of any English law, for there is no allegation of fraud, is that the defendants intended to promote revolution in Hungary, which is not an infraction of English law unless there be a design to use force on Hungarian soil in order to effect the revolution—a design, in its turn, which was not made even reasonably probable by the evidence on which the injunction was granted, and which, if ever so clearly proved, would not be cognisable in chancery, because it would be a crime. Among the authorities for asserting that crimes are not subjects of jurisdiction there, even for preventive purposes, inasmuch as that court is exclusively concerned with property or value, remarkable passages will be found in *Southey v.*

Sherwood, 2 Mer. 440; *Gee v. Pritchard*, 2 Swans. 413; *Lawrence v. Smith*, Jacob 473; *Murray v. Benbow*, 6 Petersdorff's Abr. 558; *Macaulay v. Shackell*, 1 Bligh N.S. 127, and *Attorney-General v. Sheffield Gas Consumers' Co.*, 3 D. M. G. 320. Not even will chancery grant discovery in aid of an information or an indictment at law; *Montague v. Dudman*, 2 Ves. Sen. 398. Why, if it were seriously suggested that the court could restrain the commission of a crime by an anticipatory injunction, one would not know whether most to wonder at the alternative that the court should entertain a bill which could not be accompanied by interrogatories, or at the alternative that the court should suffer interrogatories which sought to extort the confession of having meditated and planned a crime.

If from English law we pass to what the plaintiff asserts to be Hungarian law, the only mischief alleged to be threatened is not such as will sustain the plaintiff's suit. He had no procuration to represent the individual Hungarians to whom Kossuth-notes may be sold, or the National Bank of Austria, whose notes may be thrust out of circulation. The case which carries highest the right of a foreign sovereign to sue on behalf of his subjects—*Hullet v. King of Spain*, 1 Dow & Clark, 169, see p. 175—stops at property vested in him on their behalf, and breathes no word of his representing the torts which may be done to them severally. The case which carries highest the right of a foreign sovereign to sue in his public character—*King of Two Sicilies v. Willcox*, 1 Sim.N.S. 301, see p. 327—stops at property which was admitted to have been once public, and which was therefore held to be vested in the government for the time being, as a corporation with perpetual succession, notwithstanding that the government or public to which the property had been originally contributed had been forcibly supplanted against the wish of the contributors. It is of course that the sovereign person or persons in any country may make any thing a legal tender, gold or silver, paper, or even leather, which is said to have been once appointed as currency in France; and one understands that by exercising such a power a state may in fact borrow. But then all that

follows is, that the money so borrowed would be property which might be recovered if either it, or any person liable to a personal suit in respect of his dealings with it, were here. The law by which the power should be exercised would be a foreign revenue law, which it is notorious is not respected here, be such refusal to respect it just or unjust, when urged by way of defence to an action, as if any one sued by an underwriter should say that the insurance was for a smuggling voyage: *Lever v. Fletcher*, 1 Park's Mar. Ins. 506. How much less then could it claim to be enforced by way of action upon it, when there would arise the incontestable answer, that the courts of one state cannot help to govern another, but that each state must enforce its own public laws at home? But the power, until exercised, is neither property nor even fiscal law; it is only definable as a possibility of passing a law by which, if passed, the foreign state may be enabled to borrow that which, if borrowed, may be stolen, and which, if stolen, may be sued for. Nor does the bill state even this thrice-removed cousin of the shadow of a right, if such human relationships there be in the *limbus infantium* to which this bill ought to have been consigned by demurrer.

Farther, the plaintiff's assertions of what is Hungarian law, must be tried as would those of any private person in a case of property or contract. He is recognised by us diplomatically as king, but that only concerns our international relations. What he may do as king, as between himself and his subjects, is a farther question. That would be so by the nature of the case; it is emphatically so to a judge in this country, which, as we have shown, has recognised the plaintiff and his ancestors as constitutional sovereigns.

Nor, if all definite legal grounds fail, does the court of chancery possess any supplementary jurisdiction. Such a jurisdiction was claimed by the star chamber; and, among the other heads under which it exercised it, we observe the following remarkable coincidence:—"There is no established court of justice within this kingdom," says Hudson, who was clerk of the star chamber

in the reign of James I., "which useth to intermeddle with public matters of state betwixt foreign nations and this kingdom, without particular respect to the cause in question, but this court only."—(Treatise on the star chamber, in *Collectanea Juridica*, v. 2, p. 52.) We commend this passage, and the fate of that court, to the earnest consideration of the vice-chancellor; and so we conclude our review of this most extraordinary bill and its accompanying affidavit.

If any one wishes to pursue the inquiry into the constitution of Hungary, which did not fall within our design, he will find copious information in Mr. Toulmin Smith's "Illustrations of the Political and Diplomatic Relations of the Independent Kingdom of Hungary, and of the Interest that Europe has in the Austrian Alliance:" W. Jeffs, 15 Burlington Arcade, 1861: Price two shillings. Among a mass of rare and authentic documents, it contains the principal affidavits filed on the motion to dissolve the injunction in this suit.

ART. IX.—THE BANKRUPTCY AND INSOLVENCY BILL, 1861.

Draft of a Bill to Amend the Law relating to Bankruptcy and Insolvency in England.

THE Attorney-General stated with great truth, when he introduced the measure now before Parliament, that the ponderous appearance of the Consolidation Bill, on which so much time had been wasted last session, was unfavourable to its consideration by the Legislature; and on presenting a Bill which is almost as revolutionary in its character, he seemed to think it much recommended by the fact that its dimensions have shrunk to less than half the size of its ominous precursor. But within that reduced compass its authors have, with a perverse ingenuity,

contrived to retain nearly all the most objectionable features of the Bill of last session, so that we have escaped from Scylla only to fall into Charybdis.

The Bill mentioned at the head of this article is not professed to be any thing more than an amending Bill, the attempt at consolidation of this branch of the law being postponed to an unknown future; but the very fact that the provisions of this measure can be appreciated only by reference to statutes and existing enactments which it proposes to leave untouched, is a reason why it should receive the more deliberate consideration. Yet it has been pressed through its stages to the House of Lords with a degree of haste which was perhaps not too strongly denounced as indecent, and in which one cannot help discovering not only the unreasoning pressure of the leagues and associations to whose noisy dictation the Attorney-General seems to have surrendered his better judgment, but an unstatesmanlike expedient for concealing the unsatisfactory and inartificial character of the concoction. It might appropriately be entitled, "An Act for transforming the Court of Bankruptcy, inverting the officers and procedure of the court, and transferring everybody's duties to somebody else." The Bill of last session was at least consistent: it did profess to deal with the whole law of debtor and creditor, to remodel and reduce it into code, so as to present a complete and symmetrical measure of Bankruptcy Law Reform; and certainly, if there is one branch of the statute law more susceptible than another of codification, it is Bankruptcy Law; yet to save the credit of a ministry this novel, temporizing, and unsettling measure is forced upon the Legislature. In the face of the costly attempts so long made to reduce and codify the statute law, here is a bill which professes to repeal "The Bankrupt Law Consolidation Act" of 1849, and the other acts and parts of acts which are specified in a schedule, "to the extent to which in that schedule they are expressed to be repealed, or are inconsistent with this act"—a specimen of slipshod legislation which does appear to us very disgraceful. Imagine this question of consistency raised before a County Court, to which the whole

system of bankruptcy is new ! In many important respects the Bill of last session ignored the recommendations of the Royal Commissioners of Inquiry, and the evidence printed many years ago by Parliament, and adopted the crude theories of the mercantile reformers of the law, dealing in fact with the subject as if bankruptcy was a new and experimental branch of our jurisprudence. The present Bill is framed on the same principle.

No doubt, the complaints which led to these attempts at legislation are in many respects well-founded ; but such evils as are reasonably complained of are capable of remedy by judicious amendments, by releasing estates from burthens which they ought not to bear, and by simplifying procedure and facilitating the punishment of commercial frauds, without deranging the existing system, or beginning the bankruptcy laws afresh and flying to ills unknown. We can find in this "Amending" Bill hardly one beneficial provision connected with the establishment and officers of the Court, save that which throws on the Consolidated Fund, instead of the fund raised by contributions from estates, the compensation annuities of the present annuitants ; or any desirable changes in the procedure and law of bankruptcy, excepting the abolition of the present classification of certificates of conformity ; the abolition of the "execution certificate," by the grant of which, when the bankrupt has been left without protection, his punishment is now made to depend on the caprice or revenge of creditors instead of being judicially inflicted ; and the definitions of certain commercial delinquencies as misdemeanours and offences, which are to subject the offender either to criminal justice or judicial suspension of the "order of discharge" that is to be substituted for the old certificate of conformity. We do not see a single provision that will reduce expense ; but the bill is, at all events, designed to put a stop to the inordinate gains of the London Messengers, some of whom appear to be enjoying incomes equal to the salary of a County Court Judge. But the benefit of these provisions would be dearly bought at the price of all the evil and confusion which this ill-omened Bill would produce if it should ever become law.

Between "a cross fire of opposite recommendations," the government has taken a middle course which satisfies no one; which abolishes things that are not complained of, and re-enacts a procedure long ago execrated and abolished; leaves the law of Bankruptcy still scattered through various statutes, and introduces changes which have not been recommended by any Commission of Inquiry, and which most practitioners deem impracticable, or, if practicable, simply mischievous.¹ Indeed, there seems to be a pretty general opinion that, if the House of Lords should unfortunately pass this Bill, it will not only be a signal failure, but will throw every thing into a confusion from which subsequent legislation cannot extricate the sufferers. And all this is to be done and risked in order that certain great trading houses who give reckless credit, may have their own rough-and-ready expedients for recovering their demands.

We shall best introduce what we purpose to say with regard to its provisions, by briefly reminding our readers of the principal changes proposed by the Bill of last session. These were—the separation of judicial from administrative functions; the fusion of Bankruptcy and Insolvency; or (in other words) the extension of the Bankruptcy laws to persons not in trade, and the absorption of the existing Insolvency system in the Bankruptcy Jurisdiction; the restoration to the creditors themselves of the management and custody of the Bankrupt's estate; the constitution of a new tribunal empowered to deal with all questions of a debtor's discharge, and of his punishment; and the extension of Bankruptcy Jurisdiction to the County Courts, except in the Metropolitan district. The Bill accordingly proposed to abolish the existing Commissioners in the London district, to create a chief judge, to transfer to creditors' assignees many of the functions of the official assignee, to abolish certificates of conformity as well as their classification, and reconstitute the law relating to offences.

The present Bill has most of the same objects and provisions,

¹ We believe, with Lord Chelmsford, that if this Bill should be sanctioned by the legislature, "the whole plan will come to a dead lock."

except that it retains the existing Commissioners, and transfers to them in London the jurisdiction now exercised by the Insolvent Debtors' Court; and in the country gives the County Courts a present co-ordinate jurisdiction with the Bankruptcy Courts, by enabling creditors at their pleasure to remove cases from the District Courts of Bankruptcy to the County Courts, and by directing that the County Courts alone shall have jurisdiction where the debtor owes less than £300. So that in the country districts, as long as the present Commissioners hold office, two concurrent but probably discordant jurisdictions are to exist; and, on a vacancy in the office of Commissioner, his jurisdiction will be entirely transferred to the County Court, and diffused among several tribunals.

Now, it appears to us, that most of these changes are in the highest degree mischievous and prejudicial, and calculated to throw the whole system of Bankruptcy into a state of "confusion worse confounded." It has been most truly said,¹ that the successive failures of our legislation in Bankruptcy are in a great measure attributable to the intervention of the commercial leagues, who seem to arrogate to themselves the exclusive privilege of deciding on proposed reforms. No one can look through the Bill without seeing that the Attorney-General has derived his inspirations from the Mercantile Law Reformers of London and the manufacturing towns, and has been content to stand in the relation of a medium to the unseen spirits of the Chambers of Commerce; or has consulted the wandering lights of social science who kindly undertake to look after our jurisprudence, our sanitary welfare, and every other subject. But we feel confident that the House of Lords will not allow the capricious demands of the commercial classes, and the crude theories of political quacks, to dictate to the legislature the principles on which this highly important branch of law shall be remodelled; and that, if the Bill shall not have been referred to a select committee before these remarks meet the public eye,

¹ By Mr. Abrahall, one of the Registrars, in his "*Second Letter to Sir Richard Bethell*."

the House will pause, and will refer this Bill—as Bills for altering and amending other branches of the law have almost invariably been referred—to a select committee, the only tribunal competent to deliberate on a subject so complicated, and proposals so new. Every debate on this Bill, during its forced progress through the House of Commons, showed not only the unfitness of that assembly to deal with Bankruptcy Law Amendment, but that the bill was thoroughly misunderstood. Not one member in twenty has given attention to mercantile law; and the fact that the Bill has passed the Commons is due, not to its own merits, but to the Attorney-General's pertinacious and persuasive advocacy, and to the desire of the House to get rid of a wearisome and uncongenial task.

The provisions of the Bill which appear to us the most objectionable, are these:—

1. Appointing a Chief Judge of the Court of Bankruptcy, who is to have original and appellate jurisdiction.
2. Giving Bankruptcy Jurisdiction to County Courts.
3. Transferring Insolvency Jurisdiction to the Bankruptcy Courts, and subjecting all debtors to the same law, whether traders or persons not in trade.
4. Giving the Registrars of County Courts the functions of an official assignee.
5. Returning to the old and long-abandoned practice of intrusting the collection and administration of an estate to the nominee of creditors instead of the official assignees, and compensating those functionaries by continuing them in their present offices with salaries instead of fees; and,
6. Retaining the vicious practice of private arrangements and Trust Deeds.

While the House of Commons was in committee on the Bill, it received a perplexing variety of amendments; but (as a contemporary has observed) it leaves the House much as it went in, save that the Attorney-General has been obliged to give up those clauses by which the mercantile associations demanded for creditors the power to make men bankrupts after their

death, or during their absence from home for lawful business or health, or pleasure. And, if it were worth while, we could specify many other points, much relied upon by the Attorney-General in his clever speech on introducing the bill, in which it is no longer the measure he commended. In the haste to satisfy clamour, and to make a show of redeeming ministerial promises, the House has been induced to proceed without the calm, deliberate consideration necessary for framing a great measure of legal reform; and the cheers which so strangely hailed the passing of the Bill—if they expressed any thing more than a compliment to the improved temper and courtesy with which the Attorney-General had performed his part, or any thing beyond the joy which school-boys express on being set free from their tasks—proclaimed a ministerial triumph, but probably not the opinion of any one member in the House, that a successful piece of legislation had been achieved.

Now, with regard (1st) to the appointment of a chief judge, the present Commissioners being retained in office, we shall say no more than that we believe this costly appointment to be wholly uncalled for, and that there will not be business enough to occupy the time of this exalted functionary, although all applications for discharge arising in the London district are to be heard before him if opposed—a provision which seems likely to cost an estate £50 instead of £5. In the country districts, applications for discharge—whether opposed or not—will still be heard before the Commissioners, or before the County Court, if the proceedings shall have been removed to that tribunal; in which case a rich harvest is likely to await the practitioners in the court of the chief judge, who is, at all events, likely to have his hands full of appeals. Provincial courts must exist, and the concentration of all judicial functions in one judge is impracticable. Besides, we never heard that the outcry against the existing law is in any degree attributable to the manner in which the Commissioners in London exercise their functions. Those learned persons have good reason to complain of the cruel injustice done to them; judicial functionaries who have

worked for a quarter of a century in hope deferred, are now finally denied promotion, and burthened with new duties (those of the Insolvent Debtors' Court) without additional pay.

2. We strongly deprecate the proposal to give Bankruptcy Jurisdiction to the County Courts. The appointment of a chief judge is defended on the ground that uniformity of decision is to be desired; yet, by a strange inconsistency, fifty petty jurisdictions are at the same time to be constituted, and this, too, concurrently with the continuance of the jurisdiction exercised by the present country Commissioners in Bankruptcy, and in their districts. In an article on the Bill of last Session,¹ we showed how unfit for Bankruptcy Jurisdiction such a tribunal as the County Court must be; and we therefore content ourselves on the present occasion by warning the advocates for the change, that the new mode of administration will be less satisfactory, and not more economical, than the present system; that it will hand over Bankruptcy practice to an inferior and a dangerous class of practitioners, and that creditors will find themselves severely punished if such a provision becomes law. It is one thing to give creditors cheap local facilities for recovering their book-debts; it is another to intrust the working of such a system as Bankruptcy Law to fifty tribunals whose business is of a nature wholly different, and whose constitution and functions render them totally unfit to administer it satisfactorily.

Many of the objections already urged against the transfer of Bankruptcy Jurisdiction to the County Courts, apply to the proposal to diffuse amongst the five hundred registrars of those courts the functions of official assignee! The County Court Registrars have no machinery or experience applicable to the performance of those functions; and the change would merely prevent estates from being realized, and transfer some profits from the pockets of the present country official assignees to those of another set of functionaries, without effecting any saving of expense whatever.

We now come (3rdly) to the proposal to transfer Insolvency

¹ L. M. and R., May 1860.

Jurisdiction to the Bankruptcy Courts. We cannot imagine why the Attorney-General should not be content to meet the demand for a reform of the law of Bankruptcy by amending it, without disturbing the whole law of Debtor and Creditor, and meddling with such debateable ground as the fusion of Bankruptcy and Insolvency, or, in other words, the extension of the Bankruptcy laws to persons not in trade. The case was otherwise when the object of the Attorney-General was to deal with the whole law of debtor and creditor, and reduce it into code. It is very doubtful whether the distinction between the trader and non-trader should be abolished—whether all insolvency should be dealt with by one tribunal—whether the now dissimilar laws applicable to traders and to non-traders, should be assimilated—whether bankruptcy should be the additional remedy to be given to creditors of persons not in trade. The same principles are not applicable to the two classes of debtors. The relief of after-acquired property from liability to past debts, hitherto the privilege of the trader only, is a relaxation of the law of debtor and creditor, introduced in consideration of a trader's risks from the fluctuations of commerce, and from giving credit to others. Whether that privilege should now be for the first time extended to non-traders, is a question on which great difference of opinion exists, and which might well be postponed to needful reforms in Bankruptcy. We cannot believe that the House of Lords will sanction so sweeping a change without first taking evidence on the subject. At all events, if non-traders are to be made liable to the Bankruptcy Laws, the act should not be retrospective, and should apply only to debts contracted during its operation. Surely, if the Bankruptcy Court should be empowered to summon and examine a judgment debtor not in trade, with a view to attach his property for satisfaction of the creditor where an intention to evade payment appears, its interference should end there, and the insolvent debtors' court might well be left to exercise its present jurisdiction. No features of the bill were more popular with the mercantile associations than those which placed innocent debtors at the mercy of

vindictive creditors and interested attorneys; but the opposition has at least had the good effect of compelling the promoters of the Bill to modify those powers, and surround them with due precautions modelled on the provisions of the Common Law Procedure Act. Different tests are applicable to the non-commercial man: a trader (as Sir Hugh Cairns observed) is bound to be at his place of business—a non-trader is not bound to be at home; and the insolvency incident to trade is very different from the insolvency produced by extravagance, and a reckless contracting of debt. The mercantile associations were equally clamorous for those ill-fated provisions—"the dead men's clauses," as they have been called—which have made their appearance from session to session, only to be reviled and abandoned; but which, thanks to Sir Hugh Cairns, were given up on the last debate, notwithstanding (or perhaps partly in consequence of) the patronage of Mr. John Bright.

The most ill-advised, sinister, and mischievous of all the changes proposed by the present bill is, however, that of transferring from the official assignee to the creditors' nominee, or to the agents to be employed by the creditors' assignee, the collection, custody, and distribution of a Bankrupt's estate. So far as regards these duties, bankruptcy is a vicarial system for taking care of the interests of those who are unwilling or unable to watch over their own; and the *cestuis que trust* have an undoubted right to demand an effectual control over their trustees, a reduction of the official and law charges to the lowest practicable limit, and an expeditious distribution of the property realized. We maintain that creditors have at present an effectual and sufficient control in the management of the debtor's estate, whatever the interested expectants in the mercantile associations may say to the contrary; and we emphatically predict that assets will be lost, while expenses will not be reduced, by divesting the existing courts of their administrative functions. It is very well known that the trade assignee, under the present law, seldom interferes; what reason is there for supposing that he will be more ready to do so under the new? As Lord Cran-

WORTH said last session, the proposal means the substitution of the solicitor or accountant of the creditors' assignee for the official assignees appointed by the court. The Attorney-General is quite ready to sacrifice these functionaries to interested clamour, but seems to forget that the care and labour of collecting an estate must be paid for ; that it cannot be performed by an assignee who has his own business to attend to, and that the change will merely transfer the official assignee's profits to the solicitors and accountants, leaving the public ultimately to pay the salaries which are, for the first time, to be granted to the official assignees in lieu of their present allowances. The trade assignee will of course perform his duties through a paid manager ; and instead of an estate being administered by an independent, impartial, and experienced public officer, we shall have it intrusted to dependent, interested, and inexperienced hands. It is so absurd as to be hardly credible ; but by the Attorney-General's Bill there are to be two officers collecting the debts of an estate at the same time, the experienced officer being restricted to duties of least importance ! The Attorney-General does not abolish one of the existing classes of officials, but he appoints totally new officers, with undefined and untried powers, who must of course be paid for their service, and paid by the creditors. He transfers to their inexperienced nominees the functions of the " well-practised " official assignee ; and it is not one of the least of the stupid inconsistencies of this bill that it meets the interested clamour against official assignees, by providing that the registrars of we know not how many County Courts, shall act as official assignees in their respective districts ; although, as we have already said, they have no machinery whatever for discharging the functions of such an office. Finally in the teeth of the evidence and recommendations printed in 1840, in favour of encouraging the diligence of the official assignees, by making their remuneration depend on the amount they collect, the official assignees are by this bill to receive salaries, and to be continued in office, while the duties they have long performed, and indeed the most beneficial of their func-

tions, are transferred to the creditors' assignee. No less than £27,000 a-year (shade of Joseph Hume !) will be required for the salaries of the official assignees ; but they will henceforth have little to do for the creditors beyond collecting any stray debts under £10, and acting, in Japanese fashion, as a check on the nominee of the creditors ! This absurd provision illustrates the distrust and consciousness of the inefficiency which pervade the notable plan of divided responsibility introduced by the Attorney-General's Bill.

We denounced during last session a measure that would give to Mr. Samuel Morley's brother malcontents the entire control of a bankrupt's estate, and sacrifice the smaller class of creditors to the wholesale houses. Before the appointment of official assignees, estates were in most cases collected and never divided by the trade assignees ; in many instances preferences were obtained, frauds were concealed, and things generally made pleasant for the parties interested, in addition to which the bankrupt himself was at the mercy of his creditors. From the negligence and misfeasance of private trustees, and the insufferable abuses of this bad old system, the mercantile classes themselves at length prayed relief, and the public became indebted to Lord Brougham for the system of administration by official assignees, which has now been in operation in London for nearly thirty, and in country districts for nearly twenty years. But now, Lord Chancellor Campbell asks the House to abandon all this system, because, forsooth, Lord Brougham's improvements have "not been found adapted to the progress of the times !" It is not pretended that the official assignee system is not effectual ; the complaint is that it is too expensive. But there is something highly significant and suggestive in the quarters from which the outcry comes. Besides the returns now published (amongst the Judicial Statistics) show that the whole charge of the official assignee scarcely exceeds five per cent., and that the outcry is based on exaggeration and falsehood. We have no bias in favour of the official assignees, and have no inclination to become their advocate, but we are satisfied that it will be a very

false economy to transfer the management of an estate to the agents of an unpaid creditors' assignee, and the custody of the funds from the Bank of England to private bankers. If a creditor, who is worthy of confidence, be found to take the office, he is not likely to be able to discharge its duties in person, and the solicitors and accountants he must employ will not work for less than solicitors and accountants do at present. Estates will either not be collected at all, or collected at a much greater expense than they are now realized by the official assignee. The change proposed appears to us to be in effect simply the transfer of the care and collection of an estate from an official trustee attached to, and acting under the eye of, a court, and controlled by carefully devised checks and securities, to the nominee of a body of creditors, who is not to be called upon to give any security, and is not likely to possess the knowledge and experience essential to a due discharge of his duties. And here we may mention as an example of the impracticability of this Bill, that its framers seem to suppose that the bankrupt's books can be in two places at the same time, viz., in the office of the official assignee, as at present, for the preparation and verification of the bankrupt's balance sheet and accounts, and in the hands of the creditors' assignee—probably in some other part of England—for the collection of the estate and book debts above £10.

Lastly, as to the permission of private arrangements and deeds of trust and inspectorship. It is needless on this occasion to reiterate the proofs of their evils and impolicy, and we shall advert very briefly to this part of the subject. The Bill, not content with empowering creditors to turn bankruptcy into arrangement, contains provisions for giving effect to trust deeds, inspectorships, and arrangements not under control of the court; but if the framers of the Bill do intend to encourage these methods of winding-up an estate, the clause (the 205th) which places the parties to the deed in the relation in which they would have stood upon an adjudication of bankruptcy, and gives the court jurisdiction as in bankruptcy, will probably prevent such

deeds from being resorted to. The supposed economy of private arrangements is a delusion; no one knows what the expenses really are, nor what amount of assets is lost to the creditors, nor what invalid and inequitable claims are admitted. The mercantile associations that clamour for increased facilities of private arrangement, very well know that some of the worst cases of commercial dishonesty are concealed by private arrangements. Thus, for example, an attempt was made to keep the case of Streatfield, Laurence, and Co. out of the public court; and this is but one of many cases in which the expense of bankruptcy has been made the pretext for privately arranging failures that would not bear the light. In the *Times'* city article a letter appeared at the beginning of the present session, which forcibly stated the evils arising from the control of private hands, the inspectors having generally either no power, no inclination, or no interest to give their attention to the affairs, and intrusting their care to a paid manager. A balance is, in many cases, found to have remained undivided for years, while costs have accumulated; and it has been estimated that in respect of the failures of 1857, half a million of money is still detained from the creditors. But the pecuniary loss, which is only that of a few individuals in each case, is less serious than that which the whole public suffers from the suppression and impunity of fraud on the part of an arranging debtor. On this point we are tempted to quote the weighty remarks of Mr. Commissioner Holroyd, on giving judgment in the case of Laurence and Mortimore's certificates:—

“I think,” said the learned Commissioner, “this case ought to operate as a warning to the merchants and bankers of this great city, to pause and consider well before they lend their sanction to any alteration in the law of bankruptcy, with a view of facilitating private arrangements between a debtor and his creditors. Publicity is, I believe, the most, if not the only, effectual check to fraud; and though in some particular cases, creditors, as well as debtors, are desirous that their dealings should not be exposed, or their losses made known to the world, I am satisfied that when we consider the prolific source of misery from

persons trading recklessly and extravagantly beyond their capital, and living beyond their means, it would be very much for the interest of commerce, and the benefit of both creditors and debtors, that every failure should undergo judicial investigation."

So far as regards offences against commercial good faith, the Law of Bankruptcy has higher aims than the equitable administration of a debtor's assets among his creditors: with offences, it deals on behalf of the public rather than of individual creditors, and treats them as matters transferred to the category of public wrongs.

Lastly, as regards finance. If the Attorney-General's calculations, as to the prospective produce of his stamp duties, should not be better founded than those of the Chancellor of the Exchequer, in regard to his new and whimsical customs' duties, this bill, should it unhappily become law, will saddle the country with a heavy annual expenditure, for the purpose of enabling the great trading houses to recover their bad debts. While increasing the burthen on the suitors' fund, and maintaining the whole judicial establishment as it stands at present, appointing a chief judge with £5000 a-year, and giving £27,000 a-year in salaries to the official assignees, the Attorney-General either abolishes or so greatly reduces the present sources of revenue, that the fund is not likely to be equal to its liabilities.

Upon the whole, we are confident that if the legislature sanctions the proposed changes, the result will be that procedure will be complicated, delay occasioned, costs increased, and frauds protected, to the general detriment of the administration of justice. And so we quit the subject, with the question, what will the Lords do? To that august assembly too often have we had to look with confidence for protection from the crude, revolutionary, and delusive schemes dictated by the exigencies of political party, and the clamour of aggressive leagues; and it is satisfactory to find that the opinions of several of "the Law Lords" are unfavourable to many of the provisions of this Bill.

ART. X.—FURTHER REMARKS ON THE TRIAL OF LORD COCHRANE.

IN our last Number we reviewed the trial of Lord Cochrane.¹ We now recur to it to correct some errors into which we were led by the “Autobiography of a Seaman.”

In the course of our remarks we drew attention to Lord Dundonald’s bitter attack on the late Baron Gurney, for deserting his cause after having been confidentially consulted by him, and going over to lead the prosecution against him. We also gave credence to Lord Dundonald’s statement that his solicitors—then, as now, a firm holding the most eminent position—had mismanaged or neglected his case. Though we expressed our doubt as to the propriety of the reflections upon Baron Gurney, yet to the positive and circumstantial statement of Lord Dundonald we attached, as is now obvious, a value to which it was not entitled. Nor are the accusations which his Lordship launched against Messrs. Farrer & Co. justifiable, and we regret that we too unguardedly accepted them to any extent.

And first, as to the charge against Baron Gurney. The Recorder of London has favoured us with the following communication, which we are very glad to lay before our readers, and which requires no comment from our pen :—

“To the Editors of the Law Magazine and Review.

“8, PALACE GARDENS,
February, 1861.

“SIR,—The prominence given by your reviewer to a passage cited from Lord Dundonald’s ‘Autobiography,’ and the comments made upon it, render it necessary for me to request the insertion of this letter in your next Number. The following is the passage to which I refer :—‘The result was that an affidavit was

¹ L. M. & R., for Feb. 1861. No. 20, Vol. x. p. 202.

prepared and submitted to an eminent barrister, Mr. Gurney (afterwards Mr. Baron Gurney), to whom I disclosed every particular relative to the visit of De Berenger, as well as my own previous though very unimportant transactions in the public funds. I was advised by him and my own solicitors to confine myself to supplying the authorities with the name of De Berenger as the person seen in uniform at my house on the 21st ult. With this suggestion, wisely or unwisely, but certainly in all honesty, I refused to comply, expressing my determination to account for all my acts on the 21st February, even to the entire of my whole time on that day. Finding me firm on that point, the affidavits were settled by Mr. Gurney, and sworn to, the name of De Berenger for the first time thus becoming known to those who were in search of him.'

"I do not in the least complain of the comments upon this passage made by your reviewer. I quite agree with him, that if it were true that Mr. Gurney had been consulted by Lord Cochrane in the way described, and had himself settled the affidavit in question, the subsequent use made by him of that affidavit, and his remarks upon it at the trial, would have been 'unfortunate if not unfair.' But the statement in the 'Autobiography' is altogether untrue. It is untrue that Mr. Gurney settled the affidavit. It is untrue that he was in any way consulted about it. It is untrue that he was in the smallest degree cognisant of it until after it was published to all the world by Lord Cochrane. If I had no evidence to offer in opposition to Lord Dundonald's statement but my recollection of my father's account of the transaction, or the recollection of the transaction itself by his clerk, who is still living, I might hesitate to write thus positively, though I feel quite certain that it would require something more than the assertion of Lord Dundonald, who is, as your reviewer says, 'by no means careful in his statement of facts,' to convince any of my father's contemporaries that he had been guilty of a dishonourable action. But in addition to this evidence I have the statement, upon oath, made by Lord Dundonald himself when the circumstances were fresh in the recollection of

everybody. This statement is contained in the affidavit which he used on moving for a new trial, in which he gave the history of the affidavit of the 11th March. He there states that, having on the 8th or 9th of March, received an intimation that placards were affixed in several of the streets, stating that a pretended Col. du Bourg had gone to his (Lord Cochrane's) house in Green Street, he applied to the Port-Admiral for leave of absence, and arrived in London, to the best of his belief, on the 10th of March; and 'that after his arrival, he himself, conscious of his innocence, and fearing no consequences from a development of every part of his own conduct, and desiring only to rescue his character from erroneous impressions made by misrepresentations in the public prints, he, *without any communication whatsoever with any other person, and without any assistance, on the impulse of the moment prepared the before-mentioned affidavit*, which he swore before Mr. Graham on the 11th March.' Yet it is this affidavit, which Lord Cochrane thus swore was prepared on the impulse of the moment, without any assistance, and without any communication with any other person, and was sworn to within a day of his return to London, which it is now stated formed the subject of consultations with his solicitors and Mr. Gurney; and, after consultation, was settled by the latter gentleman.

"It may be as well to state what was the slender foundation for this extraordinary fiction. It was not till three weeks after the affidavit of the 11th March was sworn to and published, that Mr. Gurney was in any way consulted in the matter. On the 2nd of April a case was laid before Mr. Adam and Mr. Gurney for their opinion, as to what legal proceedings Lord Cochrane could take for the vindication of his character, in consequence of the imputations cast upon it. The case consisted almost exclusively of reports and affidavits which had been already published, and gave no information which could be used in any way prejudicial to Lord Cochrane. Some days after this, Lord Cochrane's solicitors wished again to consult Mr. Gurney, but were informed by his clerk, that since he had written on the former case he had received a general retainer from the committee of the Stock

Exchange. No objection was made at the time to his having accepted that retainer, or to his conducting the prosecution ; and it was not till some time after Lord Cochrane's conviction, when he was collecting his various grievances, that a single remark was made upon it. Indeed, up to the day of the trial, as Mr. Gurney's experience as a leader in the superior courts was at that time small, no little satisfaction was expressed by the friends of the defendants at the prosecution being completely out-counselled.

" I do not, of course, propose to enter upon the question of Lord Cochrane's guilt or innocence ; but one misstatement contained in the passage I have been commenting upon I must correct. It is stated by Lord Dundonald, and has been frequently repeated, that the affidavit of the 11th of March gave to the prosecutors the first information that the pretended Du Bourg was De Berenger.

" This is not the fact.

" It appears from the report of the Committee of the Stock Exchange, which report bears the signatures of the ten gentlemen who composed the committee, that five days before the publication of the affidavit of the 11th of March, a gentleman (to whom the promised reward was subsequently paid) had given the information, and that a warrant had actually been previously obtained against De Berenger.— I remain, your obedient servant,

" RUSSELL GURNEY."

We will now refer to the attempted crimination of Lord Cochrane's solicitors. The late Mr. Parkinson was that member of the firm of Farrer & Co. who undertook the chief management of the defence, and whom Lord Cochrane seems to have consulted from the beginning of the Stock Exchange troubles in which he was involved. It will be within the knowledge of a very large circle of persons, the best able to form an opinion, what manner of man Mr. Parkinson was. A " family solicitor " of large practice is necessarily a confidential man, personally intrusted with the most important matters connected with the property and character of the most important part of the community ; and Mr. Parkinson was for a long series of years one

of the most eminent of this influential class of professional men. A large number of peers, leading commoners, statesmen, judges, counsel, and other professional men of our own day, were his clients; and there are many who know intimately from their own experience, and from the information derived from the generation which preceded them, that Mr. Parkinson regarded his clients' interests, and protected the causes intrusted to him with a vigilance, zeal, and skill, which, in fact, was the cause of the high reputation he enjoyed. However true this may be, still when we had the positive assertion of Lord Dundonald, that Mr. Parkinson had neglected his case and ruined his defence, even his high character could not be allowed to extinguish such a charge, when it was offered to be, and had the appearance of being, substantiated. But, fortunately, it is not left to vehemence of accusation or weight of character to determine the truth of the points in issue between the late Lord Dundonald and Mr. Parkinson; for there is, we now find, direct evidence in existence upon the charges brought against the latter gentleman, with which, had we been acquainted before the article in our last Number was published, we should not only have abstained from reiterating Lord Dundonald's attack, but have offered upon it very different comment.

The charges against Messrs. Farrer & Co. are distinct. The first is—that they were guilty of neglecting Lord Cochrane's interest by not severing his defence from those of his uncle, Cochrane Johnstone, and Mr. Butt.

It will be admitted that if, without due consideration, or upon insufficient inquiry, Mr. Parkinson had determined upon making a joint defence, such neglect would have been all that Lord Dundonald affirms of it. We have, however, evidence which, in its nature, is conclusive, that the question of joining or severing was often and anxiously considered by Mr. Parkinson, in consultation with Lord Cochrane and counsel; and that with much hesitation at first, but finally, when they had the ripest information on the case, they *unanimously* concurred in advising a joint defence.

On this particular point Mr. Parkinson had consultations as follows:¹—

10th May.—With Mr. Adam,² who suggested a separate defence.

16th May.—With Mr. Scarlett, who hesitated as to which was the better course.

24th May.—With Serjeant Best and Mr. Brougham, who recommended a *separate* defence.

26th May.—With Serjeant Best, Mr. Scarlett, and Mr. Brougham, when all advised a joint defence.

27th May.—With Serjeant Topping, who concurred in the last recommendation.

1st June.—With Serjeant Best, who, on reconsideration, was still of opinion that a joint defence was preferable.

6th June.—With Serjeant Best, Messrs. Topping, Scarlett, and Brougham, when all the learned counsel (it then being two days before the trial, and the last opportunity of altering the ultimate decision) finally advised a joint defence.

After such evidence as the above, as to the anxious consideration of which course was the best to pursue, all allegation of neglect is flagrantly absurd. The above dates and particulars cannot be impeached, because they come from entries made by Mr. Parkinson day by day as the events occurred, and before any notion of Lord Cochrane's attack upon his solicitors was conceived. Further, Lord Cochrane had all these dates and facts stated to him in his Bill of Costs, and he never challenged them. It is, moreover, not competent for us, after the event, to assume that Lord Cochrane's counsel (who were the astutest of the day) came to a wrong conclusion upon the point, considering what were the facts laid before them. We are now convinced of C. Johnstone's guilt, and, if not equally certain of Lord Cochrane's entire

¹ The trial, it will be remembered, took place on 8th and 9th June.

² This gentleman was not counsel on the trial, but had been consulted early in the case. When Messrs. Farrer heard of the prosecution they hastened off to retain the leading counsel of the day, and they found that C. Johnstone had been beforehand with them, and it was by joining in defence they obtained the assistance of the eminent advocates who appeared for Lord Cochrane.

innocence, at least are sceptical as to the verdict against him being just. But we must recollect that this was not the case at the time of the consultations, when there must have seemed to be more direct evidence against Lord Cochrane than against his uncle. Not only had De Berenger been traced to Lord Cochrane's house; but other matters of a suspicious character appeared to affect his Lordship more than Johnstone. Indeed, so strong did this appear, that Lord Cochrane, as we have ascertained, on one occasion urged as an objection to a joint defence, that he, Lord Cochrane, would not owe his acquittal of such a charge to *the aid derived from the proof of another man's innocence*. We have no doubt, therefore, that the learned counsel who took the responsibility of advising on the point, exercised the wisest discretion on the facts before them, and the imputation upon Messrs. Farrer and Co., of neglect in this respect, ought never to have been made.

In the next place, Lord Dundonald alleges that the brief was not read over to him, and that he had not his attention drawn to the important discrepancy between the affidavits of himself and servants on the one hand (in which they all state De Berenger's dress was *green*); and, on the other, of the statement in the brief founded upon Mr. Parkinson's "examination" of the servants, when they said the coat was *red*, the colour of the coat, it must be recollected, being the pivot of the case as it affected Lord Cochrane. Lord Cochrane's memory has failed him here; for, in a letter to his solicitors on the 7th June (the day before the trial), he addresses himself to this *very point*; and on the 8th and 9th June, during the progress of the trial, he also wrote on the subject. Besides this direct evidence, it is now made quite apparent to us that Lord Cochrane exercised a very minute and active superintendence over the preparation of his defence, and that Mr. Parkinson, so far from neglecting his case, directed all his skill and attention, and extraordinary business powers, most zealously in Lord Cochrane's interest. Had Lord Dundonald printed his bill of costs (as we remarked in our former article), the circumstances of the case would have been immediately

understood by the legal profession, and, we think, by the public also. And we may be permitted to say that, were it to be published now, it would exonerate the memory of Mr. Parkinson entirely from the suspicion of having allowed such a point as this to pass unheeded. Thus:—

On 9th May, there was an attendance upon Lord Cochrane for the purpose of pointing out the evidence which would be required.

On 10th May, the whole morning occupied on the evidence with Lord Cochrane.

On 12th May, the servants' evidence was read over to Lord Cochrane, when he made an alteration in that of one of them.

On 23rd May, the rest of the examinations were read over to him.

On 7th June, the evidence was again read through with Lord Cochrane, who was informed that counsel was of opinion that no witnesses should be called. And on the same day arrived a letter from him, desiring that Mary Turpin's statement, that De Berenger's coat was *red*, should be expunged from the brief.

"If my servants had been called, they would have proved that De Berenger wore a green and not a red coat, as they deposed on affidavits they made," says Lord Dundonald. To which it is replied, the particular examination of these servants as to what they could prove, showed, at least in the opinion of Lord Cochrane's counsel, that they could not be depended upon for the purpose of supporting Lord Cochrane's statement of the colour of the coat;¹ and upon this point it is perfectly clear that his counsel and solicitor exercised a wise discretion. Had the servants wavered, or been, as probably was the case,

¹ It has been pointed out to us that there is in fact no discrepancy between the affidavits of the servants and their examination on these particulars. In the affidavits they say that De Berenger's *collar* was green. In the examination they repeat the collar was green, but add *that the coat was red*. Mr. Parkinson and his counsel were the best judges of what reliance could be placed on the servants as witnesses.

really uncertain as to the fact in question, or had they on cross-examination differed from each other, or admitted that the colour "might have" been red, the consequence would have been at once fatal.

This discrepancy between the servants' affidavits and their examination is, we think, explicable. The affidavits, it seems, were not prepared by the solicitor direct from the servants' mouths, but second-hand through Lord Cochrane. Lord Cochrane it seems having, contrary to advice, resolved upon publishing the servants' affidavits, and sent on the 20th March to Mr. Parkinson for a clerk to attend him, and Lord Cochrane then dictated, from notes *he had previously made*, the affidavits of the servants. This is evidently not the safest way of obtaining an uncoloured statement in an affidavit—indeed it was the mode of all others in this case likely to cause the introduction of inaccuracy.

The fact, however, appears to be, that the servants were duly submitted to a careful examination by Mr. Parkinson, who evidently was a man far more experienced and capable than was Lord Cochrane of discovering what they could prove on a public examination *and* cross-examination, neither deceiving himself nor swaying their memory. In regard to the colour of the coat, he would seem to have concluded that they would not corroborate Lord Cochrane's statement. But, considering how non-observant most people are, how treacherous is their memory, and how confused Lord Cochrane's servants might well be in the recollection of the multitude of different uniforms which they would see; considering also the opportunity there was of their being misled by the overcoat and the collar, we must not attach undue weight to their stating the dress was of one colour instead of another, and giving Lord Cochrane and Mr. Parkinson different versions. Still this state of memory would not do for cross-examination. However this may be, we did not, in our former article, agree with Lord Cochrane in condemning his solicitors or counsel for not calling the servants as witnesses. And, now the facts are looked at, we are perfectly satisfied that they exercised a sound discretion. Indeed the "statement" of Farrer & Co., in answer to

Lord Cochrane's accusation, is perfectly satisfactory on this part of the subject.¹

This statement is as follows :—

“Lord Cochrane having, in a statement prepared for the purpose of being read by him in the House of Commons on Tuesday next (a copy of which is herewith left), charged us with irregularity and neglect of duty in preparing the brief, and taking the examination of witnesses for the late trial ; we feel ourselves compelled, with the greatest regret, to submit the following facts, and make the following declarations in justification of our conduct, so far as relates to the different matters charged against us by his Lordship :—

“1st. With regard to the irregular manner in which Lord Cochrane alleges the brief to have been drawn up by us as his solicitors, we beg to observe that the whole of the statement contained in it (except the pleadings, the Stock Committee's report, his Lordship's affidavit, and the proofs) was drawn out in his Lordship's presence, and afterwards read over to and approved of by him.

“2nd. With regard to the affidavits made by Thomas Dewman and Mary Turpin on the 21st of March, and which his Lordship states to have been sworn at the Mansion House, in the presence of one of our clerks, we have to make the following declaration, viz. :—That on the morning of Sunday, the 20th of March, Lord Cochrane called in Lincoln's Inn Fields, and requested we would immediately send a stationer's man or a clerk to write for him in Green Street. That, agreeable to his Lordship's request, one of our clerks waited upon him in Green Street about half-past two o'clock, and was employed there from that time till a quarter before six on that day, in writing by his Lordship's dictation from some minutes or papers he had before him (but not in the presence of the witnesses), four affidavits, to be sworn by Thomas Dewman, Mary Turpin, Isaac Davis, and Sarah Colton, his servants, and afterwards making copies of the affidavits for his Lordship. That when the affidavits and copies were finished, Lord Cochrane kept the copies, but ordered the clerk to take the affidavits home with him ; and desired that either he or some other person would attend the witnesses (whom his Lordship said he should send into Lincoln's Inn Fields the next morning) to the Mansion House, for the purpose of getting them sworn. That on Monday morning, the 21st of March, Thomas Dewman, Mary Turpin, and Isaac Davis, called in Lincoln's Inn Fields, and the same clerk who had attended his Lordship the day before sent

¹ This statement was, we presume, the one referred to (if not read *verbatim*) by the Solicitor-general, Sir S. Shepherd, in the House of Commons, on July 19th, see 28 Hans. p. 770. There is another matter to which we would allude, viz., to our conjecture that Mr. Parkinson distrusted his client's case, and, not having faith in his statements, imparted no confidence to his counsel. We are assured that there is no evidence of this being the state of Mr. Parkinson's feeling. It was one of the difficulties of the case which Serjeant Best had to contend with, to explain away the deposition of his client which he could not substantiate, and which the other side contradicted.

them to the Mansion House, and afterwards followed them there and got the affidavits sworn, Davis having previously read over his own affidavit, and the clerk having read over to Thomas Dewman and Mary Turpin their affidavits; and that the three affidavits when sworn were sent to Lord Cochrane's, and afterwards published by him.

"3rdly. With regard to the examinations of Thomas Dewman and Mary Turpin, as taken by us on the 11th of May, and stated in the brief, being different from their affidavits sworn the 21st of March, we declare that those examinations were taken from the witnesses separately, and in the usual manner, by requiring them to state fully and correctly, and as they would be able to prove upon oath at the trial, all they knew or recollected respecting De Berenger's coming to Lord Cochrane's house in Green Street, and the dress he appeared in there on the 21st of February, and by taking down every circumstance as they stated it; but certainly without pointing out or referring them either to Lord Cochrane's affidavit, or their own affidavits sworn the 21st of March. That the examinations were afterwards read over to the witnesses separately, and approved of by them. And we further declare that the examinations so taken were afterwards read over to Lord Cochrane, who made no objection to any part thereof, except to one part of Dewman's examination, which alluded to another officer who had been at his Lordship's house in Green Street, not on the 21st, but on some other day, and, in consequence of his Lordship's objection, that part of the examination was expunged, and not inserted in the brief delivered to counsel.

"4thly, with regard to what Lord Cochrane states, that Dewman and Turpin, upon being subsequently asked how they came to state to us, as his Lordship's solicitors, that the under coat that De Berenger wore was red, they replied they never had said so; we most positively assert that when that question was put to Thomas Dewman after the trial, on his being sent by Lord Cochrane to make a further affidavit for the purpose of applying for a new trial; his answer was, not that he never told us that De Berenger came to Green Street in a red coat, but that, when he was before examined by us, he must have concluded the under coat was red, because De Berenger appeared to be a military officer.

5thly, With regard to that part of Lord Cochrane's statement in which he alleges that we, as his solicitors, in drawing up the proofs attached to the brief for the information of his counsel, copied from the public prints his Lordship's affidavit, dated the 11th of March, and published in almost all the papers of the 12th and 23rd of March, but that, instead of copying also the affidavits of Thomas Dewman and Mary Turpin, dated the 21st, and published on the 23rd of March, we examined those persons and entered up the result in the proofs annexed to the briefs, which flatly contradicted his Lordship's affidavit; and that, notwithstanding that circumstance, we omitted to call his Lordship's attention, or that of his counsel, by letter to that most essential point, we take leave to submit, that it was absolutely necessary to state Lord Cochrane's affidavit in the brief, because it might be made use of as evidence against him by the prosecutors, but that it was unnecessary to state the affidavits of Thomas Dewman and Mary Turpin, because they must be examined personally at the trial; and that, as both his Lordship's

affidavit and the testimony of Thomas Dewman and Mary Turpin as taken down by us were copied, the difference between the two as far as related to the colour of De Berenger's under-coat, was apparent upon the face of the brief, although we admit we never distinctly called his Lordship's attention or that of his counsel to that point BY LETTER. And we further beg to state, that in the affidavits sworn by Dewman and Turpin on the 21st of March, they did not state what the colour of De Berenger's under-coat was, but only that the collar of it was green, which was not contradictory to what they stated to us on their examination.

"Lastly, With regard to the orders Lord Cochrane states to have given to us for the examination of Dewman and Turpin, we beg to state that every direction we received from his Lordship on that subject was communicated and submitted to counsel, and particularly his Lordship's letter of the 9th of June, received in Court during the trial.¹

"FARRER & Co."

Before we close the subject of this remarkable trial, we must make one or two observations. The first is, that it is evident Lord Cochrane's statements must never be accepted without corroborating evidence. At all times his temper was violent, and his judgment subject to be perverted. In late years his memory must have failed him, and the "Autobiography" cannot be relied upon for truth. Further, it is shown to us that all the facts which bear upon this trial have not yet transpired. Whether in some future generation they may be published, we cannot tell. But, until this be done, we believe the question of his Lordship's guilt or innocence will be raised from time to time, nor can the truth be certainly known until more is published than is at present laid before the public. Professional honour is so strong, that, unless relieved from the duty of maintaining silence with regard to the information disclosed to them in confidence by their clients, the solicitors engaged on behalf of the defendants in this trial will not be able to reveal important matters which must have been imparted to them.² Could we possess ourselves

¹ This statement was read in answer to Lord Cochrane's attack upon Farrer & Co. It was after this controversy that Lord Cochrane wrote the letter of questions to his late solicitors, endeavouring to bring up the same and other matter inculpatory of them. To this letter they very properly made the reply of Aug. 3, 1814, and enclosed their bill of costs.

² We believe none of the gentlemen actually concerned as solicitors in this case survive. But their firms still exist, *e.g.*, Crowder, Lane, & Garth; Gabriel Tabourdin; Farrer & Co.; Brundrett, Wainwright & Spinks; Mr. Young; and Mr. Tynam.

of the facts laid by Butt, De Berenger, C. Johnstone, and the other defendants, before their attorneys, as well as all that Lord Cochrane was cognizant of, and communicated to Farrer & Co., we should be able to form a better judgment on the matter.

In our former article we came to the conclusion that, though Lord Cochrane took no part in the particular fraud of which De Berenger was the agent, yet he was probably aware that C. Johnstone was concocting some trick intended to affect their pending speculations in the funds. How far Lord Cochrane was cognizant of what was going on, and acquiesced in his uncle's scheme—whether C. Johnstone made him a confidant to any extent—found him a willing tool, or forced upon him a false position—contriving artfully to fix a deeper stain of complicity upon him than was just, we do not pretend at present to determine.

We wish we could come to another conclusion upon the evidence, and believe that Lord Cochrane was as entirely innocent as he so frequently and vehemently protested he was. It is repugnant to one's moral sense to associate mean trickery and pecuniary baseness with such personal chivalry and gallant qualities as Lord Cochrane possessed. We sympathize with the desire to prove that it is untrue that a man stamped with the true marks of nobility, genius, and greatness, has ever in any relation of life sunk to the condition of one of weak principles, petty aspirations, and ambiguous dealing.¹ It is repulsive to degrade the hero to the level of a stockjobbing trickster, or to examine into extenuating circumstances, striving to diminish his degree of guilt. Yet history, experience, and even the consideration of the nature of the human mind, forbid us to deny the possibility, or even the high improbability, of such a conflict of character and repugnant conduct. We wish to believe in Lord Cochrane's entire disconnection with the hoax of 21st Feb., 1814; and, had it been possible, we would gladly have accepted

¹ See the remarks made on the controversy touching the charge against Lord Bacon in Art. IV.

all the statements in his "Autobiography" as absolutely true ; but we must admit that we now leave the subject of this trial without any feeling of satisfaction.

SOCIAL SCIENCE.

A CORRESPONDENT has drawn our attention to an important subject which was referred to at Liverpool last autumn, on the occasion of opening the noble building which Mr. Brown munificently presented to the working classes. It may be recollected that the local body of the Social Science National Institution took the opportunity of holding, on that occasion, a meeting, over which Lord Brougham presided. We were not present ourselves, and we are now indebted to our friend for drawing our attention to what, as he says, deserves consideration. He refers to certain observations of Lord Brougham relating to the use and abuse of Party. He says that "Lord Brougham having repeatedly, both at Liverpool and at the Glasgow general congress, denounced the mischiefs of mere party combinations superseding men's attention to, and estimate of, measures for human improvement on their own merits, his lordship took occasion to urge again the same doctrine, and, in addition, to defend it from the charge of undervaluing the *use* of party ; inasmuch as the union of men holding the same opinions, was often productive of great benefit in promoting their common principles. Lord Brougham admitted this most fully, while objecting to the abuse of party connections ; and he laid down a principle of great practical importance, that men who held similar opinions, might, without any sacrifice of their individual independence, or any profession of what they did not conscientiously believe, combine for the furtherance of certain measures which they were anxious to see taken. He illustrated this by the fact—too little attended to in our natural constitu-

tion—of the power which we possess of forming habits with particular views and of a temporary duration, whilst it is also undoubtedly true, that a temporary habit may have all the beneficial influence graciously bestowed by Providence upon habit in general, and all its beneficial effects—rendering exertion easy, and preventing or overcoming the influence of pain or discomfort.” The writer suggests this subject to philosophers as well as the professional reader, and especially to the friends of social progress, for further discussion.

Notices of New Books.

[*.* It should be understood that the notices of new works forwarded to us for review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance seem to require it.]

History of England and France under the House of Lancaster ; with an Introductory View of the early Reformation ; By Henry Lord Brougham, &c. New Edition. London : Griffin, Bohn, & Co., 1861.

WE have had time to read this volume, though it arrived late in our publishing quarter ; but we have *not* time or space to review it here. Under such circumstances, the simplest and fairest plan, in order to give the reader a just idea of the work, is to resort to the preface, whenever it states, clearly and truly, the purpose and object which the author had in view. This the preface to the book before us does in an eminent degree, and it is in another respect very interesting ; for it mentions one curious fact, that the work was published anonymously many years ago. Its success, therefore, did not arise from the prestige which the name of the noble author would have attached to it had he announced himself as the author. With regard, then, to the object which Lord Brougham had in view, he must be allowed to speak for himself. He says :—"This work was undertaken with the design of ascertaining how far the feelings of national pride are beyond the reach of reason, and how far the habit of admiring only genius successful in war, or in state intrigue, is inveterate ; so that a plain exposition of facts shall not avail to make persons and events be judged by the rules of sound sense and virtuous principle.

"The period to which this work relates is one of great interest in the History both of England and of France. The events recorded, and the characters of those by whom they were brought about, deserve to be closely examined. Nor are the judgments which may be pronounced upon them confined in their bearing to those remote times ; they are of more general application. A careful consideration of the events will teach us how a great country may be brought to the verge of ruin by the follies and the crimes of faction ; a dispassionate contemplation of the characters may show how little genius crowned with success is entitled to the admiration of reflecting minds when allied to cruelty and fraud. It has oftentimes been laid to the charge of authors that they encourage, when they should restrain, the propensity of the multitude, dazzled by the glories of war, to pass over the guilt of conquerors, the enemies of the human race. A sounder view, however, is not to be inculcated by passing over the talents of those men, and only

¹ Preface, p. 1.

dwelling on their faults. The historian must above all things be calm and impartial. Forbidden to extenuate crimes, he is alike forbidden to conceal merits, though never allowed to regard the one as a compensation for the other. His conclusions are neither to be attack nor defence, invective nor panegyric; he is rather a judge than an advocate: on no account must he be a partisan.

'It is to be feared that facts being closely followed, and opinions plainly expressed, this work can find little favour either with the French or English reader. Yet the time will come when those who have been most enamoured of warlike renown, shall regard unjust aggression as not more wicked than it is shameful; when the most brilliant actions in a war waged only for plunder, shall be deemed the disgrace, not the glory of a people; and when they to whose ambition the independence or the freedom of their country has been sacrificed, shall no longer, to the lasting injury of mankind, be revered as its benefactors, but regarded only as criminals upon a large scale.

"To the praise of composition and its graces this work lays no claim at all. Every one must, by considerate critics, be judged by works done in his proper vocation; and he whose life has been passed in the Senate and the Forum, is only an author by the accidents which have made it his duty to impress upon those beyond the reach of his voice, opinions which he conscientiously believed essential to the great cause of human improvement. But while meekly submissive to criticism of his narrative in respect of its style, he challenges the most unsparing scrutiny of its fidelity and its freedom from prejudice and partiality, whether towards nations or individuals; its strict conformity to trustworthy authorities; its avoiding the fault chargeable even on the first of modern historians in all the graces of diction, though one of the least faithful, that of selecting passages, nay, maintaining opinions which lent themselves to his felicitous composition, or contributed to the entertainment of the vulgar crowd of readers."—This is a manly and genuine piece of writing, as well as a fitting introduction to a volume which we believe will take its place as a valuable contribution to History. For the reason above given, however, we defer further notice of the work.

The Province of Jurisprudence Determined—Second Edition; being the First Part of a Series of Lectures on Jurisprudence, or the Philosophy of Positive Law. By the late John Austin, Esq., of the Inner Temple, Barrister-at-Law. London: John Murray, Albemarle Street, 1861.

MR. AUSTIN'S "Province of Jurisprudence Determined" is so classical in the opinion of all who value law as a science, and has been so long out of print, that its republication will be in the highest degree acceptable. The editor is his widow, who states in the preface:—"I have altered nothing except the position of the outline, which is now placed at the beginning instead of at the end of the book. I have

inserted all the scattered memoranda I have been able to find, relating to alterations and additions which Mr. Austin meditated. Some of them are taken from a small paper marked *Inserenda*. All these things are manifestly mere suggestions for his own use, indications of matter which he intended to introduce or to work out." A second volume is to follow, containing those lectures which, though delivered at the London University or the Inner Temple, Mr. Austin did not publish. We look with much interest for these, the only farther gifts we can now hope from so great a mind. We shall not, however, await their appearance, but shall in our next Number notice at length the present important volume.

The Indian Penal Code (Act XLV. of 1860); with Notes by W. Morgan and A. G. Macpherson, Esqs., Barristers-at-Law. Calcutta: G. C. Hay & Co., 56, Cossitollah; and 2, Crescent Place, Blackfriars, London, 1861.

TO-DAY (assuming that the day on which our Review is published is that on which we write, and the reader peruses our Notices of New Books), *i. e.*, on 1st May, 1861, comes into operation the Indian Penal Code, prepared by the Indian Law Commissioners when Mr. Macaulay, who indeed may be called the author of the code, was the president of that body. We look forward with much interest to the practical working of the code, and shall take up the subject again shortly. As the editors of the volume before us remark, though the Penal code has the disadvantage of coming into operation without the adjunct of a code defining *civil* rights, and in this respect must more or less be found imperfect; yet great steps have of late years been made in fixing the procedure in civil causes, and to that extent the inconvenience of this partial attempt at codification of the law will be less felt than it otherwise would have been. Moreover, great care seems to have been taken with the "Definitions" in the Penal code.

The editors have performed a difficult task—that of editing a code, which hitherto has not received any judicial construction—with great ability. In the Commissioners' Report there was much which was valuable and interesting, and, wherever their remarks elucidate or illustrate the provisions of the code, the editors have laid them before the reader.

1. The Common Law Procedure Acts of 1852, 1854, and 1860, with Notes, Forms, and Rules. By W. F. Finlason, Esq. Stevens and Sons, 1860.
2. The Common Law Procedure Acts, and other Statutes relating to the practice of the Superior Courts of Law, and the Rules of Court, with Notes. By John C. F. S. Day, Barrister-at-Law. London: Henry Sweet, 1861.

EDITIONS of the Common Law Procedure Acts continue still to be

published occasionally, and though they cannot be substituted for books of practice, yet they have their use; for the Acts and Rules together partake of the nature of a code, admitting of a gloss or appended commentary. Our Common Law Procedure, moreover, must, in the first place, be studied in the acts themselves, which must be thoroughly mastered in all their sections, by any one aspiring to the knowledge and practice of the law.

An edition of the Procedure Statutes, therefore, if prepared with the view of explaining and illustrating their provisions, may be made very serviceable to the student, and, indeed, is occasionally useful for reference by practitioners. If care is taken by editors not to overcrowd the notes unnecessarily, to arrange accurately and concisely, and to state the effect of decisions, and if he point out the principle on which the various enactments are founded, then one editor's work is nearly as useful as another's; the latest being preferable, as having had the advantage of that new material which is supplied by personal experience or the published reports.

Mr. Finlason sometimes proves himself more industrious in acquiring knowledge of the law, and in collecting cases, than felicitous in his arrangement, or successful in digesting his matter; but we do not perceive that his "Procedure Acts" is open to this remark. Without entering upon particular comparisons between his book and that by Mr. Day, we may yet observe that it is obvious to any one, on even a casual inspection, that Mr. Day has in some respects made his volume more complete and workmanlike. And though on a larger scale (and, we may add, more expensive), yet completeness of a book will sometimes more than counterbalance its portability.

A Handy-Book for the Common Law Judges' Chambers, by Geo. H. Parkinson, Chamber Clerk to the Hon. Mr. Justice Byles. London: Butterworths, 1861.

THE business transactions at Judges' chambers is enormous, and we have advocated often some essential reform therein; but because, perhaps, most of the lawyers who are members of the legislature do not experience the inconvenience which attends the procedure at Judges' Chambers, no professional member moves in the matter. Mr. Parkinson does not deal with this question in his little volume, which is directed merely to the present practice at chambers. We will, therefore, not take it as a peg whereon to hang our own wrathful argument. There is much that would prove very useful to the practitioner in Mr. Parkinson's compilation, and which (so far as we are aware) is not to be found in any other book, collected with equal conscientiousness. He has very properly not considered it within the scope of his work to discuss applications to amend legal proceedings. It would take a volume to discuss the principle of pleading, as illustrated in the decisions at Judges' Chambers, unless, indeed, the chapter which might be dedicated to the subject, were dismissed briefly thus:—"§ 1. of the Principles of Pleading observed by Judges on Chamber Practice. There are no such principles."

The Law of Merger, as it affects Estates in Land, and also Charges upon Land; by Charles J. Mayhew, of the Inner Temple, Barrister-at-Law. London: V. & R. Stevens & Sons, 1861.

OUR readers who require a work upon the subject of Merger, may find this little volume suitable to their purpose. Its arrangement is good, and indeed we should be able to accord higher commendation than we now find ourselves justified in extending to it, were it not for two faults:—1st, That Mr. Mayhew has not admitted cases if reported in the “unauthorized” reports only; and, 2ndly, That in sundry instances the extracts from judgments are somewhat too lengthy. As an example of the first fault we may notice the omission of the case of *Gunter v. Gunter*, 5 W. R. 485; and as an example of the second, we instance the extract, extending over some eight pages (pp. 10—18), from the case of *Goodwright v. Wells* (Douglas 771), in which merger operated in excluding paternal in favour of maternal heirs. This case does not seem to us to be one which, at the present day, required a very copious notice in a little volume, in which the whole law of merger is disposed of in 161 little pages.

Examples of Administration Bonds for the Court of Probate, exhibiting the Principle of various Grants of Administration, and the Common Modes of preparing the Bonds in respect thereof; also Directions for preparing the Oaths, and full Examples of Oaths in some particular cases; with Forms of Affirmation. By Samuel Chadwick, one of the principal Clerks of Seats of Her Majesty's Court of Probate. London: Butterworths, 1861.

MR. CHADWICK is doubtless right when he affirms that there are many solicitors now practising in the Court of Probate, who, competent in every respect to manage testamentary practice, have felt inconvenience particularly from lack of a book of Forms of Bonds, such as our author has supplied, and generally from the ordinary staff of an attorney's office, being unfamiliar with the technical matter embraced in the volume before us.

We have given the title of the book in full, so that the reader may see its contents, and thereby perceive that it is supplementary to Mr. Coote's “Practice of the Court of Probate in Common Form business.” Mr. Chadwick gives numerous examples of the ordinary printed forms of administration bonds, and the required instruction for their due use; and we undertake to say that the possession of this volume by practitioners will prevent many a hitch and awkward delay, provoking to the lawyer himself, and difficult to be satisfactorily explained to the client. Such hitches are hinted at in the following paragraph of the preface:—“This work is designed to save the profession, in a great measure, the necessity of obtaining at the registries information as to the preparing, or, as it is technically termed, ‘the filling up,’ of bonds; to prevent grants of administration, and administration with the will annexed, being delayed on account of the defective filling up

of such instruments ; and, in accordance with the spirit of the Court of Probate Act, 1857 (sect. 29), to perpetuate in the Court of Probate, so far as circumstances will admit, the late practice in the Prerogative Court of Canterbury, of making each common form bond contain the entire principle of the grant to which it leads." There is only one word we would add to the above, and that relates to the form and cost of Mr. Chadwick's volume. He had, we presume, to choose between publishing a book "regardless of expense," or preparing one with a view to strict economy in the printing and general arrangement. He has elected the former—and the volume certainly presents, in consequence, advantages for the hurried man of business, as well as, we may perhaps add, the inexperienced clerk. They cannot well go wrong in using Mr. Chadwick's forms ; but, at the same time, this convenience is obtained at the expense of frequent repetition and a great waste of paper. For ourselves, we must say that, personally and editorially, we infinitely prefer a work of this sort when prepared in the shape Mr. Chadwick has adopted. We had rather pay twelve shillings as the price of trouble economized for years, than save seven and sixpence of that sum, and be incommoded more or less by dodging about the leaves every time we opened it. Yet Mr. Chadwick and his advisers should recollect that there are evils connected with costly books of practice. One of which is, that if really good, the idea is noted, cheap imitations immediately are made, and the public not unfrequently are found to prefer mere cheapness.

Events of the Quarter.

PARLIAMENTARY.

THE Parliamentary events of the last Quarter are not insignificant, but they have not assumed, as such, a sufficiently completed form to justify any comment. Experience has taught us that it is not safe to prophesy with relation to Bills in an early stage of development. We have, however, elsewhere considered the Bankruptcy, &c. Bill. It is enough to say that, in the royal speech, consolidation of the criminal law, transfer of land, and a uniform system of rating, formed a part of the legislative programme.

STATUTE LAW REVISION BILL.

THE *Parliamentary Remembrancer*, conducted by Mr. Toulmin Smith, has, as our readers know, the merit of keeping its eye vigilantly on the contemporaneous proceedings of the legislature, and of drawing attention to great and little facts, which are often improperly passed over by the press and members of the two Houses. Under the title of the "Statute Law Revision Bill," Mr. Smith,¹ in recording that it has been read a second time and referred to a select committee, says, "When the bill was before the Lords, it was urged in these pages that it ought to undergo revision by a select committee. Lord Campbell then rejected the suggestion, but the Attorney-General is wiser. The importance of the suggestion will be seen from the fact, that one Act has been struck out of the schedule while the bill has been going through the Lords, and another has been added. The Act struck out is no less than an Act touching high treason, which stood in the original bill under cover of the delusive words, 'superseded semble.'"

¹ No. 97, April 20, 1861.

LAW AMENDMENT SOCIETY.

A VERY excellent paper was read at a general meeting of this Society on February 11th, by Mr. J. Pitt Taylor, "*On the Expediency of passing an Act to permit Defendants in Criminal Courts, and their Wives or Husbands, to testify on oath.*" Mr. Taylor's arguments are conclusive to our mind, and we would fain hope they will have the effect of persuading law reformers, hitherto sceptical on the question under discussion, of the advantage of effecting this most important amendment in the law of evidence.

APPOINTMENTS, &c.

E. H. Woolrych, Esq., has been appointed a magistrate at the Thames Police Court, in the room of Mr. Yardley, who has been translated to the Marylebone Police Court, in the room of the late Mr. Seeker.

Mr. John Locke, Q.C., M.P., has been appointed to the Recordship of Brighton, in the room of Mr. Edwin James, Q.C., resigned; and Mr. J. B. Maule, of the Northern Circuit, has been appointed to the Recordship of Leeds, in the room of the late Mr. T. F. Ellis.

Mr. Norton, one of the Masters of the Queen's Bench, has been appointed to be Queen's Coroner and Attorney, in the room of the late Mr. Corner, deceased; and Mr. J. G. Malcolm, of the Home Circuit, has succeeded Mr. Norton as Master.

John Forster, Esq., Barrister-at-Law, and Secretary to the Lunacy Commissioners, has been promoted to be a Commissioner in Lunacy, in the room of Mr. Procter, resigned; and Mr. C. Spring Rice has been appointed to the Secretaryship vacated by Mr. Forster.

The following gentlemen have been appointed Queen's Counsel:—Mr. William Dugmore, Mr. W. A. Collins, Mr. A. Cleasby, Mr. H. W. Cole, Mr. John Fraser Macqueen, Mr. Thomas Chambers, Mr. E. Plumer Price, Mr. Josiah W. Smith, Mr. Richard Baggallay, Mr. Henry Mills, Hon. Adolphus F. O. Liddell, Mr. W. Baliol Brett, Mr. John Burgess Karslake, Mr. W. Digby Seymour, Mr. John Duke Coleridge, Hon. George Denman, and Mr. George Mellish. A patent of precedence has been conferred on Mr. Serjeant Hayes.

Mr. Thomas Wheeler, of the Northern Circuit, has been called to the degree of Serjeant-at-Law.

CALLS TO THE BAR.

Hilary Term, 1861.

LINCOLN'S INN.—Deane Parker Pennethorne (certificate of honour, first class); Percy Simpson; Arthur Giles Puller; Joseph Wm. Dunning; George Worthington; Charles Robert Fletcher Lutwidge; Paul Panton; Edmund Robert Wodehouse; Charles Collett; Horace Davey; John Liddon; Arthur Dixon; Charles Synge Christopher Bowen; George Randall Johnson; Bernard Cracroft; William Halfhide Allen; Frederick James Quick; Robert Smith; Angelo John Lewis; Charles Stewart; Mark William Hunter; Henry Augustus Clavering; and William John Belt, Esqrs.

INNER TEMPLE.—John Walter Tyas; Thomas Neilson Underwood; Charles William Mackillop; Henry William Franklyn; William Henry Mellor; Thomas Green; Felix Hargrave Hamel; Henry Brooks; John Barker Thornber; Henry Goldwyer; and John Martineau, Esqrs.

MIDDLE TEMPLE.—Thomas Henchman Buckerfield; Henry Michael Dunphy; Martin Harcourt Griffin; George William Paul; Alfred Richards; and Thomas Henry Goodwin Newton, Esqrs.

GRAY'S INN.—Richard C. Rogers; Timothy O'Brien O'Feely; and Julian Emanuel Salomons, Esqrs.

**EXAMINATIONS AT THE INCORPORATED LAW
SOCIETY.**

Hilary Term, 1861.

At the examination of candidates for admission on the roll of attorneys and solicitors of the superior courts, the examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction :—

Thomas Henry Bartlett, aged 21 ; Alfred Fox, aged 23 ; and Thomas Wilson Spencer, aged 21.

The Council of the Incorporated Law Society accordingly awarded the following prizes of books :—

To Mr. Bartlett, the prize of the Honourable Society of Clifford's Inn ; to Mr. Fox, one of the prizes of the Incorporated Law Society ; and to Mr. Spencer, one of the prizes of the Incorporated Law Society.

The examiners also certified that the following candidates, whose names are placed in alphabetical order, passed examinations which entitled them to commendation :—

Robert Blyth, aged 22 ; Peter Gedge, aged 22 ; Augustus Henry Reid, aged 23 ; and Thomas Needham Sheffield, aged 23.

The Council accordingly awarded them certificates of merit.

The examiners further announced to the following candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them to prizes or certificates of merit, if they had been under the age of 26 :—

Edward White Bewley, aged 29 ; James Pullen Knott, aged 39 ; James Pearse, B.A., aged 34 ; Martin Scale, aged 27 ; Weston Joseph Sparkes, aged 33 ; Frederick Stanley, aged 32 ; William Trythall, aged 41 ; Thomas Hamilton Urry, aged 44 ; and Thomas Whittington, aged 30.

IRELAND.—Mr. Deasy, the Attorney-General, having been appointed to the vacant seat on the Exchequer Bench, Mr. O'Hagan, the Solicitor-General, was promoted to the Attorney-Generalship ; Mr. Serjeant Lawson was appointed Solicitor-General, and Mr. Serjeant Sullivan was appointed Law-Adviser to the Castle, in the room of Mr. Lawson.

INDIA.—Mr. (now Sir) Colley Harman Scotland, of the Oxford Circuit, has been appointed to be Chief Justice of Madras, in the room of the late Sir Henry Davison.

HONG-KONG.—Mr. John Smale, late Reporter to the Court of Vice-Chancellor Stuart, has been appointed Attorney-General of Hong-Kong.

VANCOUVER'S ISLAND.—George Hunter Carey, Esq., has been appointed Attorney-General for this Island.

Pecrology.

January.

- 16th. O'CONNELL, JOHN, Esq., Solicitor.
- 17th. CORNER, ARTHUR B., Esq., Her Majesty's Coroner, aged 58.
- 22nd. DALY, THOMAS, Esq., Solicitor, aged 36.
- 23rd. BEACHEY, JOHN, Jun., Esq., Solicitor, aged 33.
- 24th. LEWIS, WILLIAM D., Esq., Q.C., aged 38.
- „ EGERTON, HENRY, Esq., Barrister.
- 28th. OWENS, OWEN, Esq., Solicitor, aged 87.
- 30th. LYDDON, RICHARD, Esq., Solicitor, aged 62.

February.

- 3rd. WILTON, HENRY, Esq., Solicitor, aged 71.
- 9th. STEWART, DUNCAN, Esq., Her Majesty's Attorney-General for the Colony of Bermuda, aged 66.
- 16th. GUMMER, STEPHEN H., Esq., Solicitor, aged 41.
- 18th. HALL, GEORGE, Esq., Solicitor, aged 65.
- 20th. SECKER, ISAAC O., Esq., one of the Metropolitan Magistrates, aged 63.
- 21st. REXWORTHY, JOHN, Esq., Solicitor, aged 46.
- 24th. MOCKLER, WILLIAM, Esq., Barrister, aged 48.

March.

- 1st. HULME, JOHN W., Esq., late Her Majesty's Chief Justice of the Supreme Court, Hong-kong, aged 57.
- 3rd. M'CARTHY, CHARLES, Esq., Solicitor.
- 6th. LLEWELLIN, HENRY, Esq., Solicitor, aged 55.
- „ POWELL, ARTHUR, Esq., Solicitor, aged 52.
- 24th. CLARKSON, FREDERICK, Esq., Proctor, aged 64.
- 26th. DUFLEIX, HENRY, Esq., Solicitor.
- 27th. CHAMBERS, EDWARD W., Esq., Solicitor.
- 31st. BARRINGTON, SIR MATTHEW, Bart., Crown Solicitor for the Munster Circuit, aged 72.

April.

- 2nd. MARTIN, NATHANIEL, Esq., Solicitor, aged 66.
- 4th. GRAVES, JOHN S., Esq., Barrister, aged 64.
- 5th. ELLIS, THOMAS F., Esq., Barrister, aged 65.
- 7th. CROSS, W. S., Esq., Barrister.
- 9th. SHERWOOD, THOMAS, Esq., of the Common Pleas Office, aged 74.
- 11th. NICHOLSON, GEORGE J., Esq., Solicitor, aged 73.
- 17th. COLLIS, JOSEPH, Esq., late Senior Registrar of the High Court of Chancery.

List of New Publications.

Atkinson.—*Sheriff Law ; or, a Practical Treatise on the Office of Sheriff, Under-sheriff, Bailiffs, etc.* By G. Atkinson, Serjeant-at-law. Fourth Edition. 8vo, 10s. 6d. cloth.

Austin.—*The Province of Jurisprudence Determined.* By J. Austin, Esq., Barrister. 8vo, 15s. cloth.

Barry.—*A Treatise on the Statutory Jurisdiction of the High Court of Chancery ; with an Appendix of Precedents.* By W. W. Barry, Esq., Barrister. 8vo, 15s. cloth.

Bell.—*A Dictionary and Digest of the Law of Scotland, with short Explanations of the most ordinary English Law Terms.* By W. Bell, Esq., Advocate. Revised and corrected, with numerous additions, by G. Ross, Esq., Advocate. Royal 8vo, £1 14s. cloth.

Chadwick.—*Probate Court Manual ; being Examples of Administration Bonds for the Court of Probate : exhibiting the principle of various grants of Administration, and the correct mode of preparing the Bonds in respect thereof ; also Directions for preparing the Oaths, with Examples arranged for practical utility, with the Statutes, Rules, and Orders ; also various Forms of Affirmation.* By S. Chadwick, one of the Principal Clerks of Seats of H. M. Court of Probate. Royal 8vo, 12s. cloth.

Day.—*The Common Law Procedure Acts, and other Statutes relating to the Practice of the Superior Courts of Common Law, and the Rules of Court, with Notes.* By J. C. F. S. Day, Esq., Barrister. 8vo, 14s. cloth.

Fisher.—*A Digested Index of all the Reported Decisions in the House of Lords, Privy Council, and in the Courts of Common Law, Equity, Divorce, Probate, Admiralty, and Ecclesiastical ; with a Selection from the Irish Chancery and Common Law Reports, and References to the Statutes passed, and Rules and Orders of Court promulgated, and a Collection of Cases Overruled and Impeached, during the year 1860.* By R. A. Fisher, Esq., Barrister-at-law. 12s. sewed.

Glen.—*The Law in Relation to the Legal Liabilities of Engineers, Architects, Contractors, and Builders ; including the Law of Contracts, Arbitrations, Masters and Workmen, and Combinations or Strikes.* By W. C. Glen, Esq., Barrister. Royal 8vo, 8s. 6d. cloth.

Gray.—*The Country Attorney's Practice in conducting Actions in the Superior Courts of Law, and Proceedings in the Crown Office ; with an Appendix of Forms and Bills of Costs.* By J. Gray, Esq., Barrister. Eighth Edition ; by W. Paterson, Esq., Barrister. 12mo, 17s. cloth.

Hunter.—*A Treatise on the Law of Landlord and Tenant ; with an Appendix containing Forms of Leases.* By R. Hunter, Esq., Advocate. Third Edition. 2 vols. Royal 8vo, £2 2s., cloth.

Kent.—Commentaries on American Law. By James Kent, Esq., Tenth Edition. 4 vols. Royal 8vo, £4 10s. cloth.

Kerr.—An Action at Law ; being an Outline of the Jurisdiction of the Superior Courts of Common Law, with an Elementary View of the Proceedings in Actions therein. By R. M. Kerr, Esq., Barrister, (now Judge of the Sheriff's Court of the City of London.) Third Edition. Prepared for the press by B. Smith, Esq., Barrister. 12mo, 13s. cloth.

Mayhew.—The Law of Merger, as it affects Estates in Land, and also Charges upon Land. By C. J. Mayhew, Esq., Barrister. 12mo, 5s. 6d. cloth.

Moore.—A Hand-Book of Railway Law ; bringing down the collection of Statutes to the year 1860 inclusive. By A. Moore. Second Edition. 12mo, 10s. 6d. cloth.

Morgan.—The Statutes, General Orders, and Practice Cases of 1860-1, with an Index and Notes ; forming a Supplement to the Second Edition of Morgan's Chancery Acts and Orders. By G. O. Morgan, Esq., Barrister. 12mo, 2s. 6d. sewed.

Morgan.—The Statutes, General Orders, and Regulations relating to the Practice and Jurisdiction of the Court of Chancery ; with copious Notes, and the Supplement containing all the Acts, Orders, and Practice Cases down to Hilary Term 1861. By G. O. Morgan, Esq., Barrister. 12mo, 21s. cloth.

Phillimore.—Commentaries upon International Law or Comity. By R. Phillimore, D.C.L. 4 vols. 8vo, £5.

Pritchard.—A Handy-Book for Executors and Administrators. By T. S. Pritchard, Esq., Barrister. 12mo, 2s. 6d. cloth.

Roscoe.—Digest of the Law of Evidence on the the Trial of Actions at Nisi Prius. 10th Edition, revised and enlarged by E. Smirke, Esq., Barrister. Royal 12mo, £1 11s. 6d. cloth.

Shelford.—The Law relating to the Probate, Legacy, and Succession Duties in England, Ireland, and Scotland, including all the Statutes and the Decisions on those Subjects, with Forms and Official Regulations. By Leonard Shelford, Esq., of the Middle Temple, Barrister-at-law. The Second Edition, with many alterations and additions. 12mo, 16s. cloth.

Smith.—Practical Proceedings for the Removal of Nuisances to Health and Safety. By T. Smith, Esq., Barrister. 3rd Edition, with large additions. 12mo, 7s. 6d. cloth.

ERRATA IN LAST NUMBER.

Page 232, note—for "Mr. Whitehead," read "Mr. Whitbread."

„ 364, line 6—for "heard," read "head."

„ 364, line 18—for "tread," read "breed."

THE
Law Magazine and Law Review:
OR,
QUARTERLY JOURNAL OF JURISPRUDENCE.

No. XXII.

ART. I.—THE YELVERTON MARRIAGE CASE.

IT is not surprising that the Yelverton marriage case should have caused a great deal of wonder and excitement, and should rank already among our celebrated trials. The incidents of a money demand seldom take the form of a moving drama, full of scenes of real pathos and tragedy, presenting, in one remarkable instance, a very peculiar specimen of human nature, and, though drawn out to an extravagant length, never losing its hold on the interest of the audience. It is not often that our courts of justice disclose the spectacle of an upright magistrate giving way repeatedly to uncontrollable emotion, and warning a jury against his sympathies; of an advocate urging, as a reason for a verdict, the obvious prepossessions of the Court and his hearers; and of witnesses, cowed or encouraged alternately, by wild expressions of anger or approbation. Nor have we often met with a trial containing, in parts, such improbable evidence, or in which we have found it equally difficult to judge clearly of the conduct of the parties. Extraordinary, however, and interesting as it is, we would not

discuss this *cause célèbre*, if, beyond its strictly personal bearings, it did not involve a large public question. As a pregnant proof of the state of our marriage law it suggests some important general considerations; and this, in the main, is the point of view we shall take in our tardy comments upon it.

The facts of the case are briefly as follows. In June, 1858, the Honourable William Charles Yelverton—the heir apparent to the Peerage of Avonmore, and a Brevet Major in the royal artillery—contracted marriage with a lady in Scotland, in the face of the Church, with the usual solemnities. Soon after the ceremony, the clergyman who had officiated received a copy of a regular certificate, to the effect that in August, 1857, Major Yelverton had been solemnly married to a lady of the name of Theresa Longworth, in a Catholic chapel, near Rostrevor, in Ireland. In consequence of this alarming notice, Major Yelverton, in the company of his brother-in-law, set off at once to institute inquiries as regards the validity of the alleged first marriage. It is said that an eminent lawyer in Dublin declared that it was absolutely null and void, on account of a well-known Irish statute; and there is no doubt that, upon his return, Major Yelverton lived again with his wife, whose position of course was already a painful one. In the meantime, Theresa Longworth, who certainly did not sleep over her rights, and has never shrunk from asserting them boldly, commenced proceedings for bigamy against him; and these having failed, civil suits were instituted to establish the marriage in England and Scotland. The English suit failed on a question of domicile; and that in Scotland, which alleges a case not only of a Catholic marriage in Ireland, but also of an irregular marriage in Scotland, still awaits the decree of a Scotch tribunal. As in this last suit the testimony of the parties is not, we believe, admissible in evidence, and the proofs proceed upon written affidavits, Miss Longworth adopted the further course of trying the question in a Court of Common Law, that she might be enabled to tell her own story, and detail the facts to a jury in person. Hence the celebrated trial of *TheWall v.*

Yelverton; respecting which perhaps we should add that, whatever its ultimate issue may be, it cannot affect the legal status of the parties, which depends on the fiat of the Scotch tribunal.

The evidence, though exceedingly long, may be made to fit in a narrow compass. In August, 1852, Major *Yelverton*, then in his twenty-eighth year, met *Theresa Longworth* by mere accident upon the passage from *Boulogne* to *London*. The lady was young and exceedingly clever; and the night was spent by the pair on deck, a plaid forming their common shelter; and the conversation admittedly turning on the singular topic of magnetic attraction. Next day *Yelverton* was visiting *Miss Longworth*; she having, according to his statement, invited him to make his toilette at her residence; according to hers, he having requested permission to call on her at the house of a relation. Some months afterwards *Yelverton* received a confessedly "formal note" from the lady, containing a letter to a cousin in *Albania*, which she asked him to post from his quarters in *Malta*—we believe that this was a common practice; and from this time till August, 1855, a number of letters passed between these persons, no actual meeting however occurring. The tone of this correspondence is remarkable; and like other facts and documents in the case, gives a clue, though by no means a clear and precise one, to the conduct and character of each of its authors. On *Yelverton's* part it is tolerably clear that there is little real affection in these letters; they are short, trifling, and careless in their manner; and, except in two or three uncertain expressions, they are couched in the tone of commonplace courtesy. They are just such as might have been expected from a gay young officer who had made an acquaintance which had been agreeable and might prove so again, but who never thought of the matter seriously, nor let it clash with his pleasures or avocations. It was really only in a *Pickwickian* sense that counsel could find "a serious intention" in such phrases as "What curtain is going to fall on our scene of action? will it

disclose the same action in a new relationship?" "The ocean is not distant, and both streams must end there," and other words of a similar import. On the other hand, the letters of Miss Longworth, even at this stage of the correspondence, convey to us quite a different meaning. They are brilliant and pointed, though hardly ladylike; contain a great deal of smart observation, and two or three remarkable descriptions indicative clearly of want of feeling; and evince, in many unmistakeable allusions, an eagerness to renew and convert the acquaintance into some kind of closer connexion. Even waiving the question as to the inference which a man of the world would draw from such a correspondence, it is tolerably certain what must have been the meaning of addressing Yelverton as "*Carissimo mio Carlo*," "*A moral Antinous*," "*An ideal to found on*," in reply to words of simple civility, and of making repeated hints of a courtship in the absence of anything like an engagement. We should add besides, that these letters display a consciousness of a superior strength of character, a scorn of the ordinary laws of society, and a recklessness, doubtless consistent with purity, but not the less a perilous characteristic.

As we have said, the second meeting of these persons was postponed till August, 1855. The place was a convent near Constantinople, where Miss Longworth had gone as a Sister of Charity, having heard previously that Yelverton was engaged in active service in the Crimea. We should add, however, that it is difficult to suppose that she took this step for the purpose of seeing him, since she knew that Yelverton was actually in England on leave of absence, and that for some time, when she set off on her Eastern mission. At this convent, according to her story, he made her a positive offer of marriage, which she accepted upon the understanding that he was not to claim her for some months, while he asserts that "he then conceived the idea of making Miss Longworth his mistress." Some letters followed, which on his part are certainly neither affectionate in their tone nor at all suggestive

of a promise to marry; they are light, thoughtless, and in several places throw out hints of the propriety of "caution;" while her letters, though evidently pointing to happy hopes and past love passages, and implying that all had been told to her family, are written in a style of apparent uneasiness, and suggest at least the consciousness of uncertainty. Soon afterwards further meetings took place; Miss Longworth having gone to the Crimea on a visit to the wife of a general in our service, who of course must have witnessed Yelverton's advances, and, we need not say, must have thought them honourable. On one of these occasions the lady declares that an offer of a secret marriage was made to her, to which, however, she gave a refusal; and that having heard that Yelverton was in debt she actually consented to release him from his engagement. An opposite account is given by Yelverton; his assertion being, that at this interview he informed Miss Longworth that "marriage was impossible," and that she assented to a proposal on his part to enter into a very different connexion. When this visit had closed, the lady adds that, when she was leaving Balaklava on her return, she was urged by Yelverton to marry him at once in a Greek Church, by a Greek clergyman, but that she rejected the offer on the ground that, being a Roman Catholic, she declined such a ceremony. Here Yelverton contradicts her distinctly, describing a scene of the grossest kind, which he says took place on the deck of a steamer, and from this time till February, 1857, there was no further meeting between the parties. Some circumstances, however, occurred in the interim, and a great number of letters passed, which require attention in coming to any conclusion. Instead of returning from the Crimea by Constantinople, where he well knew that Miss Longworth was, the route by the Danube was chosen by Yelverton, for the express purpose, as he contends, of "avoiding the danger" of a nearer acquaintance, and, as he certainly wrote at the time, of "not becoming the modern Tantalus." It is clear besides, that during this period he wrote a letter to Miss Longworth's sister which aroused

the grave indignation of that lady, and though that letter was not produced it is scarcely possible to doubt its import, especially as that lady was not examined. On the other hand, Miss Longworth insists that, even at this time, he was meditating marriage, that he thought of travelling with her as her brother, and marrying her at the Consulate, in Albania, and that any uncertainty traceable in his proceedings arose solely from the desire of secrecy. From the correspondence of the parties at this period, which of course is by far the most trustworthy evidence, it is not easy to collect their intentions, at least, with anything like precision. The letters of Yelverton continue distant; they are courteous certainly, but not impassioned; and it is quite evident that some of them have been suppressed, and that one or two at least have been mutilated. Those of Miss Longworth on the other side disclose unmistakeably an ardent attachment; they are rather hysterical, however, than tender; and in reading them over it is hard to conclude that they are those of a really affianced woman. Some expressions in them clearly mean marriage; but others suggest an opposite import; and they leave behind the impression of a writer whose mind is uneasy and struggling with itself, a prey to passion yet doubting in its object.

In February, 1857, Miss Longworth, attended by another lady, who has since become a Sister of Charity, once more resumed her acquaintance with Yelverton, he then being with his regiment at Edinburgh. There is no doubt that her motive in this step was to see again the object of her affection; and from this time till the following April, many interviews took place between her and Yelverton. On one of these occasions he positively affirms that she yielded to a dishonourable advance; but, although she had fallen, he also admits that only a single lapse occurred, "although the idea was constantly before him." He insists, however, that during this visit he never thought of Miss Longworth as his wife, and that anything like a ceremony of marriage, even of the most irregular kind, was never celebrated between them in Scotland. Miss

Longworth distinctly contradicts these statements, and deposes that Yelverton at one of these interviews read over the marriage service with her, declaring that this made them man and wife, and urging her to accept the consequences of the relation. This, however, she says, religious scruples forbade; and she further admits, that, whatever was the rite, no witness was present at its celebration, though the fact was at once communicated to her companion. From April to August, 1857, Miss Longworth and Yelverton again were separated, but a long correspondence passed between them, on which each places a different construction. He insists that after the occurrence in Scotland she had agreed distinctly to become his mistress, on the condition only of a "conscience saving ceremony," to be performed by a Catholic priest, but not to be of a matrimonial nature. In proof of this he refers to a letter in which he actually wrote to congratulate her on hearing of her marriage with another person, and to hint his pleasure at this end of their connexion, and to several passionate letters of hers containing expressions of a reckless self-abandonment. On her side she refers to other passages, which she says distinctly allude to a marriage to be celebrated by a priest of her Church, and to give sanctity to the contract in Scotland; and she ascribes the wild remarks he relies on to the state of uncertainty in which she was placed, "half married, and yet not married," as she termed it. We confess our inability to decide positively upon this part of the correspondence, since it may accord with either construction; though doubtless it is a most curious fact, if Yelverton thought himself bound by any tie, that he should have written at all to Miss Longworth, in the belief that she was the wife of another person. A fact of this kind, which is quite unequivocal, is very significant as regards his own notion of the nature of his relations with Miss Longworth, though of course it does not at all affect the credibility of the lady's statement that an act of some kind had been done in Scotland, which she at least believed was a marriage contract.

The acts which ensued were less equivocal. Towards the close of July, 1857, Miss Longworth and Yelverton met at Waterford; for the purpose, according to her account, of being married by a Catholic priest in a regular, though a secret manner, and according to his, of living together with a quasi-religious sanction to the connexion. There was difficulty, she says, in obtaining a dispensation, for the want of publication of regular banns; and, during a fortnight the pair travelled, apparently like a married couple, before they reached the neighbourhood of Rostrevor. In this interval Yelverton insists that open and constant cohabitation took place; but this the lady entirely contradicts; and, on a balance of the collateral evidence, we incline to believe in the truth of her statement. A wedding-ring had been bought by Yelverton before his arrival at Rostrevor with the lady; and on the 15th August, 1857, the parish priest joined their hands in the chapel, repeating with them the Catholic marriage service, and pronouncing them audibly man and wife, no witnesses, however, being present at the rite, and the benediction not having been given. There is no conflict of evidence on these facts; but on two points of extreme importance, as regards this and the alleged Scotch marriage, there is a great deal of contradiction. In virtue of several statutes in Ireland, a marriage between a Roman Catholic and a person, if of the Protestant faith at any time within the previous year, is void, if celebrated by a Catholic priest; and as Miss Longworth was confessedly a Roman Catholic, a question arose as to the creed of Yelverton, who asserts that he avowed his Protestantism at the altar. This Miss Longworth directly controverts, contending that he said, "I am a bad Catholic;" but the priest wavers between both statements, and declares that the words were, a "Protestant Catholic," an expression intelligible enough in England, but seldom applied to Irish Anglicanism. Moreover, the priest explicitly asserts that the rite was not a Catholic marriage, but merely "a renewal of a Scotch consent"—a very pregnant remark,

obviously in reference to the events in Scotland—and yet this statement is perhaps made doubtful by the fact of his having subsequently given a regular certificate of a Catholic marriage. There is little difference in the evidence on either side as regards the events which followed afterwards. For several weeks after the ceremony in Ireland Miss Longworth and Yelverton lived together; she was openly received by some friends as his wife; her name was written by Yelverton himself in a Scotch hotel-book as Mrs. Yelverton; this was also done by his directions in a passport; he described the lady as his wife at Dunkirk; and on one occasion Miss Longworth remarked to a common friend, and in his presence, that “she had been twice baptized and married.” At the commencement of 1858 the pair were settled in lodgings at Bordeaux; and some difference having sprung up, the unhappy lady was deserted by her companion. From Bordeaux she wrote him a number of letters, the greater part of which he did not produce; but in those which were proved she clearly refers to the supposition that she was enceinte, and to her resolution to publish the marriage. In reply, Yelverton reminds her of her “duty” to him. He tells her that, in the event of her death, she may “leave a legacy of the facts.” And he writes about “avoiding the event,” which he says refers to a premature delivery. It is scarcely doubtful from this correspondence that the lady at least believed herself married, and that Yelverton thought himself bound to her by a tie that was not one of dishonour; but it should be added, that in one of those letters he maintains that an important alteration has been made, which his counsel of course impute to Miss Longworth. In the month of May, 1858, the final act of abandonment took place, and Miss Longworth reached Scotland only in time to hear of Yelverton’s second marriage.

Such is a short sketch of this celebrated cause; and, in looking critically at the evidence, we do not doubt the propriety of the verdict that a *prima facie* case of marriage has been established. This is all that the jury had to determine;

and however questionable they must have thought the value of parts of Miss Longworth's story, or however loudly some have condemned the clamour and uproar prevalent at the trial, the dramatic form which it was permitted to assume, and the hue of excitement flung on its incidents, we concur entirely with the decision, remembering that it is not in any way final. Assuming it to be the law of Scotland that a man and woman who read over the marriage service in a private room and without witnesses contract thereby an irregular marriage—an assumption which it lay with the *jury* to make upon the testimony of Scotch advocates on account of a strange anomaly in our law—we cannot doubt the occurrence in fact, if we bear in mind the expression of the priest as regards the renewal of a *Scotch consent*, and the very remarkable words of Miss Longworth in reference to her *double marriage*, which we cannot conceive as uttered with any purpose. Even with respect to the Irish marriage, we think there was much to warrant the finding. There is no doubt, in the eye of the law, whatever may have been the idea of the priest, that what occurred in the chapel near Rostrevor would have been a perfectly valid marriage had both the parties been Roman Catholics; and the weight of proof was cast upon Yelverton, who pleaded a penal statute in his favour, to establish clearly a profession of Protestantism. Even disregarding Miss Longworth's negative, this affirmative proof was not made out in anything like a satisfactory way, and it is very remarkable that none of his family were called to attest his religious tenets. Besides, the odiousness of Yelverton's defence, and the many improbabilities of his story, were very naturally taken into account in coming to a conclusion against him. We have no wish to join in the outcry against a person who, if seriously guilty, was not we think as bad as he has been described, and was led on by peculiar temptation. But we are not surprised that a jury discredited his evidence when it was not corroborated. Without considering his motives to falsehood, his whole account of his relations with Miss Longworth is antecedently extremely

improbable, and requires an unimpeachable witness to sustain it. If in fact she agreed to become his mistress at an interview in the camp at the Crimea, why should he have kept aloof from her for several months after this occasion; and why should she have written to him referring plainly sometimes to marriage? It is not credible that such a man would have shunned a gratification which, by his account, was offered to him on his own terms; nor are the letters of Miss Longworth at all consistent with such an hypothesis. Again, the scene he refers to at Balaklava is obviously in a high degree improbable; and can it be believed if Miss Longworth fell, in Edinburgh, in 1857, that this was confined to a single occasion, every opportunity being open to the parties? Nor is it likely that a man like Yelverton, of mature age and selfish disposition, would have run the risk of going through such a ceremony as took place in the chapel near Ros-trevor if he had already effected the purpose he alleges; nor yet that if he thought that ceremony nothing he would have given Miss Longworth his name and allowed her a wife's apparent status.

While, however, we think that the verdict was just as regards the cardinal facts of the case, especially as that verdict depends on legal assumptions subject to review, we decline to believe all Miss Longworth's story, or to look with favour upon her conduct. It may be true that her statements and explanations were clear, coherent, and unshaken by cross-examination; that she managed to reconcile her evidence and her letters with much tact and plausibility, and that she took the audience by storm by her thorough *aplomb* and ladylike manner. But it must be remembered that the weapon of cross-examination, even in the ablest and most dexterous hands, may prove powerless against a statement prepared *with notice of all the evidence*; and, even as it stands, we think that her story is in some parts incredible and contradicted, while we own our surprise that many of her acts did not rouse feelings different from sympathy. If in truth she was affianced to Yelverton since August, 1855, and had made her

family aware of the fact, why were none of them called to attest a matter of such extreme importance to her case, and why especially did a letter from Yelverton, written several months afterwards to her sister, excite evidently that lady's indignation? If she steadily refused an offer of secret marriage and an offer of a marriage by a Greek priest, why did she afterwards join in a scheme of a marriage by a consul in Albania, and not object to what happened in Scotland? And if, after the alleged Scotch marriage, she insisted upon a Catholic ceremony of a solemn matrimonial character, why did she at this—the very crisis of her life—abstain from saying so openly and unequivocally? These are some of the obvious objections to her story; and to these should be added the extreme difficulty of making her letters conform to it in many very remarkable particulars. It is not easy to suppose that the letters between August, 1855, and February, 1857, are those of an affianced woman; and though two of them, we think, refer to marriage, and all of them breathe a peculiar passion, there are several open to grave suspicion as hinting at suggestions of misconduct. There is also a difficulty in interpreting the letters between February, 1857, and the rite in Ireland, according to the construction she gives them; and the inference from this difficulty is strengthened by the plain speaking of all the letters which were written after the marriage in Ireland. The alteration in one letter, in a vital point, is also a very significant fact; and, on the whole, we think her evidence is inconsistent in many respects with the trustworthy record of the contemporaneous documents.

The truth seems to be, that Theresa Longworth, whose conduct, to say the least, was unscrupulous, was eager, probably from genuine affection, to make herself the wife of Yelverton; that she caught at any expressions of his which pointed at all in that direction, and put her own construction upon them; that she was not above inciting his passion, if

ever she saw a sign of its remitting, by listening to hints and making suggestions which have a very questionable meaning; that she trusted to herself to compass her end without a technical sacrifice of chastity, but careless how she strayed on its utmost verge; and that modesty, self-respect, and discretion were as nothing to her if success were accomplished. This theory rejects a great deal of her evidence, and is not very complimentary to her; but it reconciles the facts and the letters, and it harmonizes with her probable character. It is quite ridiculous to represent her as a model of deep, though enthusiastic, feeling, as has been done by some silly persons. Her conduct shows tenacity of purpose, an utter recklessness of social laws, a disregard of feminine propriety, a nature violent in its passions and impulses, but not tender, gentle, or womanly, and an intellect of considerable force but ill-trained, and without discretion. Such a character, resembling the "Constance" of Scott, came in contact with a commonplace profligate, who, though not without a kind of selfish cunning, and not at all a deliberate criminal, was wanting in foresight and reckless of consequences; and the result has been that the more powerful nature has obtained a triumph which will prove a curse, and that the inferior one has been driven to abysses of sin which were never contemplated.

The permanent interest of this case, however, consists in the commentary which it affords upon the state of our law of marriage. It is obvious that what occurred in Scotland—a reading over of the marriage service, in a private room, in the absence of witnesses, not a scrap of paper to attest the act, and the natural consequences of marriage rejected—ought not to be held a matrimonial contract. That the most solemn of social engagements, which binds the actual contractors for life, extends its influence far into the future, involves the rights and the status of third persons, determines usually the transmission of property, and is therefore a matter of public interest, may be entered into in a clandestine fashion, and be

proved by the oath of an interested party, and by inferences from subsequent acts, which at best are only consistent with it, is evidently contrary to justice and reason.

On the other hand, it seems equally absurd, that a marriage solemnized in a Christian church, by a priest whose orders are recognised by law, attested by a regular certificate, and followed by its natural result, avowed cohabitation as man and wife, should be liable to complete avoidance, not on the ground of want of publicity, nor of any fraud or informality in the rite, but upon a purely collateral fact, which it may be impossible to ascertain at the time—the religious profession of one of the parties. In a nation of many intermingled creeds, it would surely be wiser to nullify marriages on account of the colour of the hair of the parties than to do so upon the score of their religion, since the one fact is evident to the world, while the other is latent, and must always remain so. And yet so anomalous is this part of our jurisprudence, that we venture to predict when this *cause célèbre* shall be argued upon the points of law, which the recent verdict has left untouched, that Miss Longworth's counsel will mainly rely upon the validity of the alleged Scotch marriage, and that ultimately little stress will be laid upon the Catholic marriage in Ireland. Whether in the Scotch or the Irish courts, or at the bar of the House of Lords, we suspect that the act which should be deemed a nullity, according to common sense and justice, may very possibly be held a marriage, and that the rite which was clearly a marriage in the eyes of three-fourths of Christian Europe will probably be avoided on the most dangerous pretext. This leads us to make a few observations upon the law of marriage in Great Britain, considered as a scheme of general justice, affecting all Her Majesty's subjects; to point out its most glaring defects, and to indicate how, without running into extremes, or shocking local or national prejudice, it may perhaps be in part amended.

The requisites to a law of marriage are tolerably well agreed upon by jurists. They are (1) something of Uniformity in the

rite; (2) Publicity, as regards the making of the contract, and in preserving the evidence of it; and (3) Security that it shall not be avoided by latent conditions difficult of ascertainment. These requisites are fulfilled in France, where all obstructions of custom or ignorance having been effaced by the Revolution, the framers of the Code Napoleon were enabled to lay down rules upon this foundation. But, though not so simply or clearly marked out, they are, and have been for many years, secured practically in England by law; and there is no doubt of the advantage they have conferred. By the ancient Common Law of the country a priest was *necessary* to celebrate marriage; a ritual was used and the fact was registered; and all subjects without the prohibited degrees were held capable of entering into the contract, with no restriction but that of age, which was fixed at the earliest time of puberty. It is true that clandestine marriage *engagements* which the Spiritual Courts could enforce specifically were introduced by the Canonists afterwards; but these were violently assailed at the Reformation; and were finally nullified by Lord Hardwicke's Marriage Act. That celebrated measure approached the principles above enumerated in reference to marriage; it required all marriages—save those of Jews and Quakers and those sanctioned by special licence—to be celebrated in the face of the Church, according to the rites of the Church of England; it laid down a number of plain regulations to secure notice and the evidence of the contract; and, as regards the capacity of the parties, it annexed one important condition only, the consent of guardians to the marriage of minors. Uniformity and Publicity were thus assured; nor was the condition respecting minors exactly of a latent character; but as the statute became obnoxious to the mass of English Dissenters from the Church—who objected reasonably to being compelled to marry under sanctions of which they did not approve—and as the rule in respect of minors was considered to work considerable wrong, the law has again been changed in this century. Except in the instances of Jews and Quakers, and of persons married by

special licence, the law in England requires all subjects to be married, either in the face of the Church, or by the registrar, attended by a minister, in a registered place of religious worship, or by a purely civil functionary, in all cases enforcing the use of words expressing clearly the meaning of the Act, the presence of witnesses, and preceding notice, and laying down rules which have worked well to secure the preservation of the proof of the contract. Thus the rite is perhaps as uniform as possible, and is proved to be sufficiently public; while no latent condition whatever is allowed to affect the validity of the engagement. All persons without the prohibited degrees, if of the age of fourteen and twelve respectively, may marry in England according to these rules; and though the marriages of minors without consent are made subject to certain penalties, they are not impeachable when duly celebrated.

The law of Scotland is very different, and stands a disgrace to a civilized nation. It is idle to say that it has worked well so far as regards Scotchmen and Scotchwomen; for, as the *lex loci* validates the contract, in all places and between all persons, so this law attaches every subject of the Queen the instant he reaches the Scotch jurisdiction, and has lived for twenty-one days within it. The Yelverton marriage case is an instance of this; since Yelverton was a domiciled Irishman, and Miss Longworth a domiciled Englishwoman, when the act deposed to occurred in Edinburgh; and in the Dalrymple and other cases, the parties, or one of them, were not Scotch subjects. This monstrous law disregards the rules which Christian and civilized Europe admits are necessary to the contract of marriage; and the result has been incalculable mischief to the peace and welfare of numberless families. Uniformity in the rite is not only not thought of, but even a definition of marriage is not laid down with any precision. Without referring to regular marriages, what is termed an irregular marriage in Scotland may be entered into by words,* or signs, expressive of a present intention to marry; by a promise,

* See *Macadam v. Walker*.

which* possibly need not be written, if followed by the consequences of marriage; and by evidence of habit and repute, concurring to prove the conjugal relation. It is needless to dwell on the encouragement to fraud, to false swearing, and to cruel litigation, and on the ruinous uncertainty of proof which customs like these must produce, and of which the Yelverton case and others—the scandal and shame of our Law Reports—are well known and mournful examples. To aggravate the matter, publicity is not necessary before, at the time of, or after the rite; no notice need be given of the intention of the parties; the intention may be momentary and secret if mutual; no priest, registrar, or functionary need intervene; no witness is required to validate the contract,† though usually present as evidence of it; and, as though to ascend to the climax of wrong, no record is needful to inform third persons, whose rights and happiness may be involved, that such an engagement has ever existed. It is truly melancholy to think of the consequences which have often flowed from this shameful clandestinity; and it is too bad that if reckless persons are allowed to contract such marriages as these, the whole life of innocent third parties, as in the Yelverton and Dalrymple cases, should be shipwrecked by reason of such a licence. We need not add, that with such a law, conditions, whether latent or not, are not annexed to this scandalous contract. It is open to minors of fourteen and twelve, without obtaining the consent of any one, and of course to persons of greater age if without the prohibited degrees of affinity.

When we turn to Ireland we are met with other mischiefs. These mischiefs arise from different causes; in part from the anomaly of an Established Church, in theory national, in fact sectarian; in part from the status which the Church of Rome has been given in its relations to the law; in part from the

* See *Honeyman v. Campbell*, 2 Dow. and Cl. Lord Brougham in this case expressly says the promise may be inferred from circumstances. The opinion, however, was extrajudicial, and is contraverted by all Scotch lawyers, who hold that the promise must be written, or admitted on oath.

† See *Dalrymple v. Dalrymple*, 2 Haggard.

half recognition allowed to the Presbyterian Church in that kingdom; and in part from throwing difficulties in the way of treating marriage as a civil contract, the aspect from which the State should behold it. In a nation split into hostile sects, uniformity in the rite is hardly to be expected; nor is the absence of this requisite a matter of much regret in Ireland. A want of publicity as to Catholic marriages, when celebrated by a Roman Catholic priest—that is as to fully two-thirds of the marriages which take place in this part of the empire—is one of the greatest evils of the system, and its consequences have been very disastrous. The policy of ignoring the Roman Catholic Church in Ireland, in the interest, as supposed, of the Establishment, has induced the State not to interfere in the action of the Roman Catholic priesthood in respect of marriages between Roman Catholics; and the result has been, that no precautions exist to enforce the publicity of these contracts. An Italian friar in Ireland may join the hands of the heiress of the House of Norfolk with those of a private in the Papal Brigade without giving notice to any person, without the publication of banns or licence, at any hour of the day or night, without leaving a record of the rite, and without having a witness to attest it. For an act like this he is not amenable to any one but his ecclesiastical superior, in all probability a foreign prelate; and the marriage is good in all parts of the empire, and carries with it the incidents of the tie, though celebrated in this clandestine manner. This is evil enough; but a further evil arises from the variety of latent conditions affecting marriages between persons in Ireland, the neglect or the unobservance of which avoids the marriage in all respects, however solemn may have been the rite, or however innocent may have been the parties. With this wild licence as regards his own persuasion, an Irish priest cannot possibly marry a Roman Catholic to any person who has been a Protestant within the previous year; the Catholicism of both is a condition to the contract, and this purely collateral and latent fact is actually made the test of its validity. The Yelverton case shows the

mischief of this; but numberless other instances have occurred, nor is the mischief confined in Ireland to marriages celebrated by the Roman Catholic priesthood. Until 1844 no Presbyterian clergyman could marry two persons unless they were both Presbyterians; and in the great case of the *Queen v. Milis* this latent condition saved a bigamist, reduced a wife to the rank of a concubine, and bastardized children supposed legitimate. Even now this evil remains in part:* it is still a condition to this kind of union that one of the parties must be Presbyterian; and it is very probable, that since 1844 many marriages to all appearances good, may be put in peril by its non-observance. In fact, excepting marriages solemnized by clergymen of the Established Church, or those performed by the civil registrar, a mere fraction compared with the rest, all other marriages celebrated in Ireland are open to objections on several grounds admitted by every civilized jurisprudence.

It would be idle here to do more than to hint at the means which, we think, might palliate these evils. As regards the Law of Marriage in England, it has worked well, and requires no amendment. As regards irregular marriages in Scotland, if Scotch subjects insist on retaining them, we think their effects should not attach on other subjects till settled in Scotland for a longer period than twenty-one days, and that they should be void if unregistered. As for Irish marriages the question is more difficult, for it involves very complex considerations, and it touches on feelings, interests, and passions, which are proverbially jealous and sensitive. But we think the State might fairly allow full latitude to the clergymen of the Churches which embrace the mass of the Irish nation—the Established, the Roman Catholic, and the Presbyterian—to solemnize marriages between its subjects without regard to any condition of creed, insisting in return on a general law enforcing some kind of uniformity and publicity; and, as regards all other denominations,

* There is no doubt a clause in the Irish Marriage Act which *seems* to meet this obligation partly; but it is very obscure and ill-worded; and every one knows the danger of rights established only by collateral provisos.

might, in every respect, assimilate the law to that already existing in England. It is to be hoped this Session will not elapse without some change in these parts of our law; and that the empire may be saved from such mischiefs as the Yelverton case has made too apparent.

ART. II.—THE PROVINCE OF JURISPRUDENCE DETERMINED.

The Province of Jurisprudence Determined. Second Edition.

Being the First Part of a Series of Lectures on Jurisprudence, or the Philosophy of Positive Law. By the late JOHN AUSTIN, Esq., of the Inner Temple, Barrister-at-Law. London: John Murray, Albemarle Street. 1861.

THE republication, so long looked for, of Mr. Austin's classical work, coincides curiously with the appearance of Mr. Maine's *Ancient Law*, which might be considered at first sight to inaugurate an antagonistic, and in this country a new, line of juristic thought. A suspicion, however, that such was not the fact would soon be roused by the high esteem in which Mr. Maine is well known to hold the labours of his predecessor, whose definitions he has to a considerable extent adopted; besides, as we understand, basing the method of his own official teaching on Mr. Austin's outline of his Course of Lectures, formerly appended, and in the present edition prefixed, to the *Province of Jurisprudence Determined*. And on a closer investigation it becomes evident that these two great thinkers belong merely to different stages of the same revolution which, since the last century, has been effected in legal philosophy; stages of which the mutual remoteness is made to wear the *prima facie* shape of contradiction and incompatibility, merely because the scanty literature of scientific law in this country presents no name of importance to bridge over the interval.

The course of the revolution to which we refer has been, generally, from a *a priori* assumption to an inductive treatment of the subject. The *a priori* assumptions current in the last age were discrepant enough, as they must be when men will guess instead of observing; but in the want of foundation in fact the Law of Nature which haunted the dreams of Rousseau may be fairly compared with the perfection of reason, which was to Blackstone a foregone conclusion in all that he wrote of the law of England, and impelled him to a perpetual fabrication of motives for that which had grown up through the unpurposed accumulation of causes. Nor, when the first steps were taken out of this chaos towards the study and comparison of facts, did the lines of investigation immediately coincide, though already obviously convergent. For as all true induction begins with the facts which are close at hand, so those first steps could not be directed to the remote history of legal conceptions and rules, but only to the ascertainment of what law actually is in the present; an inquiry which was certain to bring out the difference between Englishmen and Germans, between politics and metaphysics. Jeremy Bentham is of course the English hero of this stage. His eye is turned outward on the world, and particularly on the relation of rulers and ruled, lawgivers and law-receivers. He examines law as it exists in the society around him, and finds it composed of the command, and the sanction by which the command is enforced: he distinguishes the duty and the right which are the correlative parts of the obligation imposed. Kant is the type of a host in Germany who examine law as a product of human nature, tracing it inwards to its fountain in the ideas, both speculative and practical, of which it is the embodiment. The one, by analysis of objective facts, assists the classification of laws and rights; the other, by intuition of subjective facts, explains the nature of law and right. Both are inductive in their methods, but neither the classification nor the explanation can be perfected till the past is added to the present; and the next step in the revolution accordingly guides inquirers to the

Roman law, as at once the most complete, the best known, and the most nearly related to modern jurisprudence. It is in this stage that the great name of Savigny is so conspicuous. Lastly, we have arrived at a point when it is both necessary and possible to embrace in the induction legal systems far more remote from us than the Roman, both in time, in geographical position, and in the strangeness of the ideas to which they introduce us ; when patriarchal and oriental institutions, viewed in the light which philosophy has recently poured on them, can be utilised for the purposes of juristic investigation, through the greater knowledge which in the preceding period was gained of the early Roman institutions with which they must be connected. With this stage of the revolution we have been made familiar by Mr. Maine's *Ancient Law*.

It is needless to say that in England we have no *catena*, no "succession" of scientific lawyers, representing the numerous gradations of the progress which has been thus roughly traced in outline. When, at long intervals, any of our compatriots betakes himself to this line of study, it is antecedently probable that he will combine the characteristics of the current continental school with those of the stage to which his last insular predecessor had attained. To Bentham, indeed, no such remark can apply, both from his marvellous originality, and because the regular progress of induction in jurisprudence is not to be traced farther back than him. But we have already observed on the sympathy which Mr. Maine, himself an ardent historical investigator, and of those periods too when law was most unlike what it now is, feels for the hard definitions of Mr. Austin, which seem so incapable of lending themselves to the magical transmutations of historical perspective : and similarly Mr. Austin appears to have united in himself the period of Bentham, to which he belonged by a discipleship not broken on this side of the water by any intermediate novelty of juristic thought, and that of Hugo and Savigny, to which he belonged by date, and by actual study in the prime of life at Bonn. Nor can this mixture be regarded, in either case, as anything but an

advantage. It gives the thinker a breadth and stability which is wanting to the mere members of a passing school, who too often refuse to their predecessors that recognition of the necessity of their labours to the ultimate attainment of truth, which nevertheless is the only recognition they can, for their own labours, justly expect from their successors, fondly as they may deem that they have themselves attained to the truth. And in Mr. Austin's case the plurality of his points of view was additionally harmonised, and the strength he derived therefrom augmented, by the singular felicity with which Roman law, above all others, falls in with the classifications founded on Bentham's analysis. As political and as objective as the English, and as little likely to allow speculation on the inner nature of law to obscure in their minds its positive institution, the Romans were, besides, free from that other veil which in England has been thrown over the positive institution of law by referring the introduction of new rules to a nominal development from precedent; and they had no feudal system to confound their classifications. No writer then could be more favourably placed for perfecting the systematic form of jurisprudence than one who, like Mr. Austin, combined an intimate knowledge of Roman law with the principles of the most thoroughly English school of legal thought which has arisen.

The residence at Bonn, to which we have alluded, occupied a part of the years 1827 and 1828; and on Mr. Austin's return from it, he delivered at the London University the ten lectures which, arranged in six, form the volume now at last, after long public demand, reprinted. The author had contemplated entirely recasting the work, but the additional matter which his widow and editress has been able to insert from his papers is of very small extent. One of the longest of the new passages, that which occurs between the first and second lectures, we will give at large, as it furnishes at once a specimen of Mr. Austin's very peculiar style, and a summary view of the course which his disquisition takes at the outset.

“The matter of the science of jurisprudence is law strictly so called.

“But this, as I stated in the preceding lecture, is liable to be confounded with certain objects to which it is allied or related in the way of resemblance or analogy; viz., divine laws and religious precepts, moral rules or the laws of morality, and laws merely improper or purely metaphorical.

“To extricate the subject of jurisprudence from these foreign, though related, objects, is the purpose which I am trying to accomplish in this earlier portion of my course; and in order to accomplish this purpose the following, I think, is the obvious and convenient method:—

“1st. To enumerate the essentials of a law or rule, as taken in the largest signification which can be given to the term with propriety.

“2nd. Having stated the essentials of a law in the largest signification of the term, to distinguish divine and moral laws from laws strictly so called.

“3rd. To advert briefly to the metaphorical applications of the term, and to cleanse it of the other ambiguities by which its import is obscured.

“Accordingly, I endeavoured in my last lecture to explain the essentials of a law as taken in the largest signification which can be given to the term with propriety, as embracing every object to which we can apply the term without extending its import analogically, and without deviating into sheer metaphor; as comprising religious precepts and certain moral rules, together with the laws which are strictly so styled.

“Subject to the restrictions which I there stated, and which it were extremely inconvenient to repeat here, the result of the analysis which I applied to the term law is this:—

“1st. That a law or rule is a command.

“2nd. That, as distinguished from the commands which may be named occasional or particular, a law is a command which obliges to a *course* of conduct, or which obliges *generally* and *indefinitely* to acts or forbearances of a *class*.

"But laws which are strictly so called, laws established by political superiors, are not the only objects which this definition embraces. It comprises every object to which the term law can be extended, unless it be used with a meaning which is purely metaphorical and improper. It applies with perfect precision to religious precepts, or to the laws which are established immediately by God himself; and it also applies, although with a little inaccuracy, to those laws of human but not of political institution which may be styled the moral law, or the rules or precepts of morality. In short, I have stated the essentials of a law in the large signification of the term; and have still to distinguish the laws which are the matter of the science of jurisprudence from the laws, divine and human, which are the matter of other sciences" (pp. 26, 27).

By placing in immediate juxtaposition with the above the following passage from the commencement of the sixth or last lecture, not one of the new insertions, but in which Mr. Austin traces the whole remaining outline of his argument, from the point at which the preceding fragment was inserted, we shall have the advantage of a complete epitome of the work from the hand of the author himself.

"In my second, third, and fourth lectures I stated the marks or characters by which the laws of God are distinguished from other laws. And stating those marks or characters, I explained the nature of the index to his unrevealed laws, or I explained and examined the hypotheses which regard the nature of that index.

"In my fifth lecture I examined or discussed especially the following principal topics (and I touched upon other topics of secondary or subordinate importance). I examined the distinguishing marks of those positive moral rules which are laws properly so called: I examined the distinguishing marks of those positive moral rules which are styled *laws* or *rules* by an analogical extension of the term: and I examined the distinguishing marks of laws merely metaphorical, or laws merely figurative.

“ I shall finish, in the present lecture, the purpose mentioned above, by explaining the marks or characters which distinguish positive laws, or laws strictly so called. And in order to an explanation of the marks which distinguish positive laws, I shall analyse the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*. With the ends or final causes for which governments ought to exist, or with their different degrees of fitness to attain or approach those ends, I have no concern. I examine the notions of *sovereignty* and *independent political society*, in order that I may finish the purpose to which I have adverted above; in order that I may distinguish completely the appropriate province of jurisprudence from the regions which lie upon its confines, and by which it is encircled. It is necessary that I should examine those notions, in order that I may finish that purpose. For the essential difference of a positive law, or the difference that severs it from a law which is not a positive law, may be stated thus: Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or, changing the expression, it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author. Even though it sprang directly from another fountain or source, it is a positive law, or a law strictly so called, by the institution of that present sovereign in the character of political superior. Or, borrowing the language of Hobbes, ‘ the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be a law ’ ” (pp. 168—170).

The index to the unrevealed laws of God, in the investigation of which, as will have been seen from the preceding extract, so large a part of the volume is occupied, Mr. Austin finds in the theory of utility, as explained by Bentham. It is not our purpose to detail the arguments by which he supports it, but we can assure our readers that if they desire really to

understand a theory which ranks among the most important agencies, whether for good or evil, that philosophy has ever launched among mankind, there is no work which they can better consult for the purpose. All the analysis which Mr. Austin so laboriously, but also so successfully, employed in order to arrive at clearness in his own thoughts; all the felicity of expression with which he was able to place before others, without exaggeration or diminution, distortion or incumbrance, the very thoughts which he had so cleared up for himself; all the quaint, but to a reader as conscientious as the writer not always unpleasing, repetition and circumlocution with which he kept before the mind the thought, once happily expressed, until it had had time to settle there; all the candour with which he sought to enter into the objections of opponents, and all the patience with which he sought to remove them, are here lavished upon a theme no less worthy of such qualities than the foundations of ethical science.

To the merits of this admirable discussion even those parts of Mr. Austin's character contributed which were the least favourable for the happiness of his life, and for the development, in some directions, of his rare endowments. Though justly confident in his own powers, his temperament was not bright or hopeful, but such as prepares for itself the want of external success which it early anticipates and early acquiesces in. As first at the bar, and afterwards in his attempt to promote the scientific study of law in England, so too in estimating the practical results of an ethical theory, or the future prospects of the human race, he had as lively a sense of obstacles and drawbacks as of his own resources for meeting them; and, never looking but for imperfections, his was one of those few minds that can sum up the products of an ardently loved hypothesis without promising more from it than it can perform, and at the same time without thereby losing faith in it. Among the advocates of general utility, as the guide of legislation, and the ethical test of right and wrong, Mr. Austin, as able and as staunch as any, is distinguished by the admission that many of

its results are dependent, not only on the question what means are most conducive to certain ends, the answer to which would be freely allowed to vary with circumstances, but on the farther question, what ends men will recognise as useful when they see them, the answer to which he allows to be often one of taste. "For," says Mr. Austin, "first, the positions wherein men are, in different ages and nations, are in many respects widely different: whence it inevitably follows that much which was useful there and then were useless or pernicious here and now. And, secondly, since human tastes are various, and since human reason is fallible, men's moral sentiments must often widely differ even in respect of the circumstances wherein their positions are alike. But, with regard to a few classes [of actions] the dictates of utility are the same at all times and places, and are also so obvious that they hardly admit of mistake or doubt" (pp. 91, 92).

The effect of this admission reaches, however, beyond what Mr. Austin here points out. If utility be in any degree a matter of taste, then it is not merely that as to many actions there must always be a great diversity of moral sentiments, but even, as to those on which there is an agreement practically unanimous, no ultimate appeal is left against the exceptional depravity of individuals. The reference to general utility becomes the homely recommendation to consider the consequences of your actions in the widest manner, including those which would follow if similar actions were general. If you like the consequences, thus widely considered, and we dislike them, we may coerce you—but there is an end of the argument. Mr. Austin urges, and with justice, that no shortcomings can be pleaded against his ethical theory, unless the objector offers another theory which will effect more: and he would doubtless have said that to invoke the moral sense of your opponent is no more hopeful a method of terminating a dispute than to invoke his taste in the matter of consequences. But, though this were so, we should at least plead the shortcomings of Mr. Austin's theory in mitigation of the sarcasm which he

deals out to his antagonists. The following passage is rich with our author's peculiar humour.

"To the adherent of the theory of utility, a human law is good if it be generally useful, and a human law is bad if it be generally pernicious. For, in *his* opinion, it is consonant or not with the law of God, inasmuch as it is consonant or not with the principle of general utility. To the adherent of the hypothesis of a moral sense, a human law is good if he likes it he knows not why, and a human law is bad if he hates it he knows not wherefore. For, in *his* opinion, that his inexplicable feeling of liking or aversion shows that the human law pleases or offends the Deity" (p. 116).

Capital! but the sting is blunted, if we add that "to the adherent of the principle of general utility, a human law is good if he likes its consequences he knows not why, and bad if he hates its consequences he knows not wherefore." In what does the alleged moral sense differ from the sense by which we appreciate, after we have calculated them, the consequences of a class of actions? Or has any ethical writer of importance ever contended for the immediate application of the moral sense, as a test, to any action but those of the simplest kind? For the rest, we have no quarrel with Mr. Austin when he says that "in so far as law and morality" (by which he means positive human morality) "are what they ought to be, legal and moral rules have been fashioned on the principle of utility" (p. 54). The theories of utility and the moral sense may converge as we trace them to the centre, but they are vulgarly accepted on the surface as representing very different modes of proceeding, of which the more circumspect and elaborate is as appropriate to the establishment of rules, as the other is to speed and certainty in action.

The sixth lecture is devoted to the ascertainment of the idea of independent political sovereignty; to the elucidation of the various forms in which such sovereignty exists, as monarchy, aristocracy, joint sovereignty, federation, &c.; throughout which the essential unity of the quality of sovereignty is traced

with consummate skill, and the person or persons pointed out in whom in each case it resides; and, among much other disquisition upon or flowing from the nature of political society, and connected with the main object of the book by its relevancy to the essential difference of a positive law, we have a racy satire on the theory of an original contract. It is a striking instance of Mr. Austin's analytical powers that he was the first to present in its fulness the idea of independent political sovereignty, of which the negative side, or the independence of the sovereign one or body on foreign powers, had arrested the attention of Grotius, while the positive side, or the obedience paid to such sovereign one or body by its own subjects, had formed the definition of Bentham. The essential difference of a positive law we have already seen in Mr. Austin's own words: and the province which is ultimately determined for jurisprudence is the science of such laws as they are, without regard to their goodness or badness; parallel to which there is suggested a science of positive morality, treating with equal indifference of those current rules which are not set by virtue of political superiority, and of international law among them. To each of these again corresponds another science, containing that regulative matter which Mr. Austin was far from undervaluing, though it was the labour of his philosophical life to separate it from the matter which it should regulate. Thus over against jurisprudence is placed the science of legislation, determining what law ought to be; over against the science of positive morality, that of morals, determining what *they* ought to be; these being the two departments of the master science of ethics, or deontology in Benthamese. (See particularly, for these classifications, pp. 114, 115.)

It is mainly by this rigid demarcation between law as it is and as it ought to be, and the clearness with which he accordingly marks the distinction between right as meaning faculty, and right as meaning justice, (see p. 257,) that Mr. Austin's views may be practically important on the future

of English law. One of the favourite maxims of the Common Law courts has been, that "where there is a right there is a remedy." Now in a country which possessed a *code civil* and a *code de procédure*, that maxim might receive an interpretation not inconsistent with jurisprudence as understood by our author. It might there mean that every duty which the *code civil* imposed was presumably enforceable by those *towards* whom it was imposed, through some faculty, or right, of action against those *on* whom it was imposed; and that if the *code de procédure* did not clearly point out such a faculty, it would be the duty of the courts to supply it by their general authority for the administration of justice. It is true that, even in this sense, the maxim that "where there is a right there is a remedy," would not be expressed in Mr. Austin's language; because he would have placed the word "right" in the second member of it, to denote the faculty of action constituting the remedy, and not in the first member, where it could only denote the advantageous situation created by the *code civil* for those in whose favour it imposed duties, and which situation would need the "right" in Mr. Austin's sense for its protection. Nay: to the substance of the maxim, explained as here suggested, Mr. Austin would have objected that a law may create an advantageous position in favour of a private person, and yet intend that the corresponding duties shall only be enforced by public remedies. Still, the maxim, thus explained, would at least remain in form a maxim of jurisprudence, even when rendered into the phraseology of the *Province of Jurisprudence Determined*. But it is notorious that in our courts of Common Law the maxim has been in fact applied to determine whether there was any legal duty incumbent on the defendant towards the plaintiff, whether the *damnum* (loss) complained of was or not accompanied by *injuria* (breach of law). To find whether there has been *injuria*, you must, it has been said, consider whether any right of the plaintiff has been violated: (see Smith's Leading Cases, p. 131 e:) that is, you must get at the plaintiff's right as best you can; having got it, you con-

struct therefrom your law, your article of the *code civil*, and then conclude that the plaintiff may enforce that article by suit against the defendant. Now this is a mode of argument which cannot be so translated into Austinese as to preserve even the outward form belonging to what our author calls jurisprudence. Starting from the right instead of from the law, it must necessarily use the former term in a sense somehow connected with natural justice; making the judge a legislator, by supposing in him an authority to appeal to what Mr. Austin would have called ethical considerations. Its use, however, was peculiarly convenient when the whole body of the common law was of such limited extent, and so little adapted to the wants of a highly commercial society, that the judges were under the necessity of creating new rules for new sets of circumstances. But now that we possess so ample a mass of law, not unwritten, though scattered through the reports, and of origin modern enough to be suited to our present wants, there is a growing disposition to reverse the old logic of Westminster Hall, and argue from the law to the right, leaving expansions and amendments of the law to Parliament; which disposition will probably be much promoted by the present employment of Mr. Austin's writings in the system of education for the bar.

It may be observed, for the rest, that the reasoning in the courts of equity has always been more in accordance with Mr. Austin's conception of jurisprudence than that in the courts of Common Law. For the great engine by which the former have built up their jurisdiction and doctrines has been the assumed legal prohibition of fraud; legal, we of course mean, in the wide sense, and not in that which is opposed to equitable. Here therefore they at once had *injuria* in the strictest sense as their foundation. No matter how novel the conditions under which fraud might be asserted, the plaintiff got his right because the defendant had broken a rule existing in his favour. The court might of its own discretion interpret the duties of defendants with increasing strictness, but the necessity of

avoiding an apparent excess of jurisdiction precluded it from asserting rights in plaintiffs except as consequences of those duties. The legislation at common law was covert, veiled in the unjuridical argument that "where there is a right, there is a remedy." The legislation in chancery was open: "to-day and henceforth such and such conduct is fraudulent and prohibited:" but the argument which proceeded upon it was juridical.

These are a few of the reflections occasioned by this most suggestive book. Others may be postponed till the appearance of the yet unpublished lectures, which Mrs. Austin promises us from her husband's papers, and for which we look with the deepest interest.

ART. III.—JOURNAL OF A GLOUCESTERSHIRE JUSTICE, A.D. 1715—1756.

*Journal of the Rev. Francis Welles, Vicar of Prestbury,
Gloucestershire, and Justice of the Peace for the County of
Gloucester, A. D. 1715 to 1756. Fol. MS.*

(Continued from p. 142.)

OUR former notice of this curious manuscript terminated with the Gloucester Spring Assizes, held March 9th, 1718, (it must be remembered that in those days the year commenced at Lady-day,) before Mr. Baron Montague, and Mr. Baron Fortescue Aland. The Quarter Sessions which intervened between this and the Summer Assizes, and which were held respectively on April 7th and July 14th, 1719, Mr. Cox, of Gloucester, and Mr. Delabere, being the presiding magistrates, appear to have afforded Mr. Welles no better materials for his Diary than a few settlement cases, the following of which, coming before the bench on the later of these occasions, is the most deserving of attention. "A maid," he informs us,

“was hired at Midsummer to Michaelmas, and served that quarter. Then her master treated with her for a year, but they could not agree upon wages; the maid would have forty shillings, the master would give her but thirty-five shillings. So they parted; but the master told her iff she could not mend herself, she might come again upon those terms. She went and hired herself for a year at another place, but staid but about eight or nine days, (and received, I think, nothing there,) and came back to her former place, and without making any other bargain than what was made at Michaelmas, or so much as mentioning anything about their bargain, staid up the year to Michaelmas, and received her year's wages, that is, the thirty-five shillings. The Bench was much divided upon this case; a retrospect of the quarter of a year was not insisted upon. But there being a hiring between, and eight or nine days' service upon that hiring, the majority of the Bench was against its being a settlement. Tho' I am very doubtful how it would go iff it were to be removed into the King's Bench. For all the hiring that the maid had was at Michaelmas, and though she went away and hired herself afterwards, yet she had her master's leave to return again, and so she did. And he, without the least scruple, paid her all her wages as iff she had never went away.” Whatever doubts may have been entertained upon the propriety of the above decision, it appears nevertheless to have been considered satisfactory by the parties concerned, no steps being taken either in the King's Bench or elsewhere to secure its reversal. It is, however, observable, that Mr. Welles himself, several years subsequently, and on a similar occasion, expresses his surprise that the case then before the Bench should be “so long and strongly insisted upon, when the opinion of our Court had been so constant and clear in this case ever since I sate in it to keep up strictly to the letter of the Act, for a year's hiring and a year's service.”

At the Assizes held at Gloucester on July 18th, 1719, we find Mr. Welles in raptures, and pronouncing a Daniel come to judgment. The Judges on that occasion were Lord Chief

Justice King, and Mr. Justice Dormer. "I observed," says the Reverend magistrate, "nothing remarkable at this assize. But my Lord Chief Justice King, whom I never knew before, gave me great reason to have the highest opinion of him, and a just respect and veneration for his person. I had the honour to dine with the Judges at Andov,* at Gloucester, and afterwards at Worcester, and I observed in all the discourse that happened, he spoke with such a due and serious regard to God and religion, when anything tended to those subjects, and so gravely and learnedly checked and baffled everything which seemed to lessen the honour or reputation of the clergy, or to set them aside from any share or authority in the government of the State; and showed so much reading and skill in antiquity upon that subject, that I could not but have the highest idea of him, and he brought my Lord Chief Justice Hale fresh into my mind."

Sir Peter King, sometime Recorder of London, and who was eventually created Lord King, and became Lord Chancellor, was raised to the Chief Justiceship of the Common Pleas, October 27th, 1714, immediately after the accession of George I., in the room of Lord Trevor, then removed from the Bench. Two other Judges appear to have been superseded at the same time; Sir William Banister was removed from the Court of Exchequer, Sir James Montague, already mentioned, being appointed to succeed him, and Sir Thomas Powis, the cancellation of whose appointment to the King's Bench we had occasion to mention in our former article, was succeeded by Sir John Pratt, who was afterwards, in May, 1718, created Lord Chief Justice of his Court. Simultaneously with the above, several other changes seem to have taken place. Sir Samuel Dodd was appointed Chief Baron of the Exchequer, "Nicholas Lechmere Solicitor-General, (*vice* Sir Robert Raymond,) Spencer Cowper Attorney-General, and John

* It is not quite clear what place is here meant. Probably Andoversford, situate some fifteen miles from Gloucester, where the Judges may have halted on their journey from Oxford, the Gloucester Assizes being at that time the next in rotation upon the Circuit.

Fortescue Aland Solicitor-General to His Royal Highness." We further learn, that about the latter end of November, 1714, the King advanced the salaries of the Chief Justice of the King's Bench and the Chief Baron of the Exchequer to the same sum as allowed to the Chief Justice of the Common Pleas, being £2000 a year, and the salaries of the other nine Judges to £1,500 a year.*

At the Quarter Sessions held October 6th following, Mr. Cox, of Gloucester, Chairman, Mr. Welles duly attended, but "went home before any causes came before us, receiving a letter that Frank was ill."

The following Quarter Sessions, held January 12th, 1719, Mr. Delabere, Chairman, seem to have offered what was considered a somewhat difficult point for the decision of the assembled Justices. Here is an account rendered us of the matter. "A case, as the justices and counsel agree, perfectly new, has happened, and which, therefore, after opening and some arguing, was, by common consent, to be drawn up specially, and determined by the Judges of the King's Bench. A man who had a wife and four or five children was settled at Brockworth, but bought at Chosen the reversion of an estate after one life for the term of eighty years, if he or his wife should so long live, for the sum of twelve pounds. The life did not drop before the man died. 'Tis now fallen, and the woman is possessed of the estate. The man could have no settlement at Chosen by virtue of an estate which was in his lifetime only in reversion. The Qu: is, whether the children shall follow the mother, who has now the estate in possession? or have their settlement there where their father had his at his death?"

The question here presented for the solution of Mr. Welles

* By the 6 Geo. IV. c. 82, all fees, &c., payable to the Lord Chief Justice of the King's Bench, as also his right to dispose of certain offices attached to the Court by sale, are abolished, and his salary fixed at the yearly sum of £10,000. The 6 Geo. IV. c. 83, abolishing similar fees and powers of the Lord Chief Justice of the Common Pleas, fixes his salary at the yearly sum of £8000. The 6 Geo. IV. c. 84, confers upon the Lord Chief Baron of the Exchequer a yearly salary of £7000, and fixes the salaries of the Puisne Judges and Barons at £5,500 each, and to such as shall be appointed after November 16, 1828, £5000.

and his contemporaries, nevertheless appears to have already arisen, and to have been decided in the year 1714, in the case of *The Inhabitants of St. Catherine's near the Tower* against *The Inhabitants of St. George's, Southwark*, in which the Court of King's Bench held, that when a mother, on the death of her husband, becomes the head of her family, any settlement acquired by her in her own right during widowhood, as by estate, renting a tenement, &c., is communicated to her unemancipated children. This case does not appear to have been reported, but was cited and acted upon in *The Inhabitants of Woodend* against *The Inhabitants of Paulspury*, 2 Lord Raymond, 1473, where the circumstances are fully set forth.

The following Assizes were held before Mr. Baron Price and Mr. Baron Page, March 12, 1719. On this occasion the latter of these learned Judges enlarges somewhat upon the doctrine of asportation, and to his observations upon that subject Mr. Welles adds some annotations of his own: "One thing," he informs us, "Baron Page said which I did not know, or was doubtful of before; that if a man be taken with a horse, riding (or I think leading) him, though he be not got out of the ground wherein the horse was at grass, yet 'tis stealing him. But since the intent always makes the felony, I believe in such a case scarce any jury would find a man guilty iff it did not appear very plain and unquestionable that his intent was to steal him. And perhaps scarce any circumstances would be strong enough to bring them off from the favourable side. Especially since (as he said upon the tryal of two horse-stealers) if the jury believed a man rid away a horse only upon a Frolick, and designed to bring him back again, 'tis only a misdemeanour, they will be much more prone to take it for no more than such, or a trespass, when he never rid away with him at all. And I believe scarce ever any man was hang'd for stealing a horse at grass or out of a ground, iff he was caught with him in the ground."

We are further informed, that at these Assizes "a case was referred to them for their opinion, which was, I think, whether

a man purchasing an estate for years determinable upon lives (it cost, I think, about 5 li:) gained him a settlement. They were both of opinion it did. But one party *being not satisfied with their opinion as being Barons of the Exchequer*, removed it by *certiorari* to the King's Bench."

It seems that up to the time of the passing of the 9th Geo. I., c. 7, any estate in land purchased by a person for any sum, however small, would confer a settlement in that parish, in the same way as an estate acquired in any other mode. But by the 5th section of that Act it is provided that no person shall be deemed adjudged or taken to have gained a settlement for or by virtue of any purchase of any estate or interest whereof the consideration of such purchase does not amount to £30 *bonâ fide* paid, for any longer or further time than such person inhabits in such estate; and he is then liable to be removed to his last place of settlement. It would seem, therefore, that the learned Judges, notwithstanding the slight regard in which the opinion of a Baron of the Exchequer appears to have been held with respect to questions of parochial law, were nevertheless in 1719 justified in arriving at the above decision.

Sir Francis Page was appointed a Baron of the Exchequer, May 23rd, 1718, and was afterwards, on November 4th, 1726, made a Justice of the Common Pleas.

It was before this Judge that the hapless poet, Richard Savage, took his trial for the murder of Mr. James Sinclair, who met his death during a midnight brawl in an obscure coffee-house, near Charing Cross, on November 20th, 1727, at the hands of Savage and two of his companions. If we are to credit the account rendered us of the trial by Johnson in his "Lives of the Poets," the learned Judge was not prone to such merciful distinctions as he appears to have drawn in the case of the horse-stealers as above reported by Mr. Welles, between stealing a horse and "riding him away upon a Frolick." Johnson informs us that "had his audience been his Judges he had undoubtedly been acquitted; but Mr. Page, who was

then on the bench, treated him with his usual insolence and severity, and when he had summed up the evidence endeavoured to exasperate the jury, as Mr. Savage used to relate it, with this eloquent harangue: 'Gentlemen of the Jury, you are to consider that Mr. Savage is a very great man, a much greater man than you or I, gentlemen of the Jury; that he wears very fine clothes, much finer clothes than you or I, gentlemen of the Jury; that he has abundance of money in his pocket, much more money than you or I, gentlemen of the Jury; but, gentlemen of the Jury, is it not a very hard case, gentlemen of the Jury, that Mr. Savage should therefore kill you or me, gentlemen of the Jury.' " Savage was found guilty, and left for execution, and but for the strenuous exertions of the Countess of Hertford in his behalf, would, no doubt, have undergone the extreme penalty of the law. The interposition of this lady was, however, so successful that he was, though not without very considerable difficulty, admitted to bail, and eventually, in the March following, enabled to plead the King's pardon.

For the degrading and perilous position in which he considered himself to have been placed by the harshness and malevolence of Mr. Justice Page, Savage afterwards took such revenge as was in his power by the publication of a satire, in which the—if we adopt his opinions it is difficult to say learned—Judge is handled certainly not with too much tenderness. After briefly glancing at some of the legal luminaries of that day, "Yorke of delicate address," "Cummings mild," and "Fortescue humane," by way of contrast with his enemy, he summons to his aid his powers of abuse, which appear to be of a somewhat transcendent order. He speaks of his persecutor as—

"Of heart impure and impotent of head,
In history, rhetoric, ethics, law, unread;"

and then, after accusing him, amongst other ungentlemanlike qualities, of an incapacity for blushing, a decided taste for

corruption, of being "drunk with power," and a dealer in "vile buffoon abuse," thus proceeds:—

"But how 'scape prisoners? To their trial chained,
All, all, shall stand condemned who stand arraigned.
Dire guilt, which else would detestation cause,
Prejudged with insult, wondrous pity draws.
But 'scapes e'en innocence his harsh harangue?
Alas! e'en innocence itself must hang;
Must hang to please him when of spleen possessed,
Must hang to bring forth an abortive jest."

That Mr. Justice Page managed in his day to achieve notoriety we have, however, evidence of a more unbiassed nature than that of Richard Savage; from which, moreover, it would appear that he had a smooth as well as a rough side to his tongue, and could upon occasion "roar you as gently as a sucking dove." The circumstances under which we hear of him in his second and more pliable character are as follows:—In 1770, several years after time had deprived the Bench of the Common Pleas of his presence and services, Mr. John Almon, "bookseller, opposite Burlington House in Piccadilly," having incurred the displeasure of the then existing powers, by the publication of an alleged libel in a certain magazine, known as the *London Museum*, (the said libel being, as we learn from *Lloyd's Chronicle*, of November 30th, in the above year, no other than "Junius's letter to the K——,") was proceeded against by way of information by the Attorney-General. The defendant's case seems to have been, that during his absence, and without his knowledge or sanction, his assistant received into the shop a number of copies of the obnoxious periodical, under the impression that his master would willingly promote, as he had done before, the sale of the publications of Mr. Miller, the printer and proprietor of the *London Museum*. This defence, however, does not seem to have availed him, for being convicted and brought into Court to receive sentence, Lord Mansfield directed that certain affidavits in extenuation of his guilt should be read, and amongst others that of Robert Morris, barrister of Lincoln's Inn, and some time secretary to the supporters of the

Bill of Rights. This gentleman deposed that he went to the shop of the defendant for the purpose of purchasing the said *London Museum*, being the same as that for which the defendant was informed against, upon which the said defendant told deponent that he did not sell the same, and that he the deponent was thereupon obliged to go away without the said pamphlet, nor did he at any subsequent time procure the same from the said defendant, but (*verily believing in his conscience that the said pamphlet did not contain any libellous matter whatsoever*) purchased the same elsewhere. These expressions in the affidavit of Mr. Morris seem to have aroused the ire of Mr. Justice Aston, who in pronouncing judgment took occasion to observe, that although certain of the affidavits might be admitted in extenuation of the defendant's guilt, yet, with respect to that of Mr. Morris, he "should pay very little regard to any affidavit he should make." Thus maligned, that "wrath-kindled gentleman" administers a counter thrust, in the form of a letter addressed to the above-mentioned learned but free spoken Judge, and published in the shape of a pamphlet; in which both the latter and the then Lord Chief Justice, Lord Mansfield, are, to say the least, unceremoniously handled. "Were it possible for me," writes Mr. Morris, "which God forbid! when many years and long experience shall have ripened my judgment, to stand candidate for the honours and emoluments of my profession in the royal disposal, I might then perhaps, as other men have done before me, find it the wisest way to be of the same opinion with my Lord Chief Justice, and, *like old Judge Page*, think it would very ill become me to differ from my Lord Chief Justice."

At the Quarter Sessions held April 26th, 1720, (Mr. Cox, of Gloucester, Chairman,) "A case," says Mr. Welles, "was to have come before us, but 'twas respited, I think, to await the termination of another, which 'twas thought would determine this, and now depending in the King's Bench. 'Twas, as I remember, this:—A woman who had a settlement married a vagrant, and had a child by him; the vagrant died, and left the

woman and child (being about four years old). The question is, where the child shall have its settlement? whether where the mother's is, or where it was born?"

The law in such case is now at all events clear. The place of birth is *primâ facie* the settlement of legitimate children; but only so until another settlement acquired by the pauper in his own right is shown to exist, or, in default of any such acquired settlement being ascertained, until the father's, or (if he have none) the mother's settlement be made out. *Rex v. The Inhabitants of St. Mary, Beverley*, 1 B. & Ad. 201; *Rex v. St. Mary's, Leicester*, 3 A. & E. 644.

There is a further note respecting this same case, in which Mr. Welles says, "Talking with Mr. Delabere since, he tells me 'tis not known whether the father be dead or not; he went away and left his wife. She was sent as a vagrant with the child from Gloucester to Little Dean, and is since dead. Where the child was born is difficult to find out, at least to prove. So that Little Dean is like to have a hard case of it. For how shall they get rid of the child?"

How Little Dean "got rid of the child" appears by a note of the proceedings at the next Quarter Sessions, held July 12th, following. "The child above mentioned was sent by Little Dean to the place of its birth (upon oath, the order says, but does not mention upon whose oath; whether the mother's oath was taken before she died). That place appealed, but being able to say nothing to disprove it, and the order being upon oath, was confirmed."

At the Assizes held August 1st, Lord Chief Baron Bury and Mr. Justice Fortescue Aland were the Judges, the latter of whom "showed in his charge a great deal of learning, and spoke many things worth noting. He first spoke of the division of laws into Divine and Humane, and of Divine into natural and reveal'd. In speaking of humane laws, he took notice of the excellency and antiquity of our own. That none in the world ever excelled them. He observed the defects or faults of some laws of other nations that were held in greatest

reputation; particularly the law of the Twelve Tables among the Romans; one grand fault of which was giving parents the power of life and death over their children. In speaking of the antiquity of our laws, he said he had seen, I think in the Cotton Library, a book or collection of them of above eleven hundred years' standing, dated, as I remember, about the year 561. He said Alfred, the first King of all England, who reduced the heptarchy into a monarchy, reduced also the laws of all those kingdoms into one, and thence 'twas call'd *communis lex*, the common law for the whole kingdom. He spoke very well upon the point of religion, the observation of the Lord's day, &c., and said, which is very remarkable, he was sure the Ten Commandments were once reputed part of the Common Law of England. He pressed Justices always to take the examinations of felons, and likewise of the witnesses against them; for when they come to Gaol they have other stories put into their heads, and the examination of the witness being upon oath, is it seems, iff they should dye, evidence against the criminals, as well as their own confession. And for want of such examinations, criminals often escaped. He exhorted Justices to attend the service of their county at the Assizes, &c.: for he said those that did so constantly, always have, and always will have, a much greater influence upon the country than others, and he knew some noble men that scarce ever failed upon such occasions, and their interest among the people was answerable."

We have before had occasion to remark upon the custom of this learned Judge, (who since his previous appearance at Gloucester Assizes has been transferred from the Court of Exchequer to the Common Pleas, and appears henceforth therefore as Mr. Justice Fortescue Aland,) of favouring Grand Juries in his charges with choice morsels of wisdom, afterwards embodied in the preface to his volume of Reports, published, as we learn, eighteen months after the death of the author, which took place in 1746. In the above charge he draws largely upon the hoards of information which he had collected and

digested, it would seem, at least some twenty-five or thirty years before they appeared in print. The division of law propounded by him for the edification of the Magistracy of Gloucestershire, is, however, somewhat modified in his preface. He there tells us that "the grand division of Law is into the Divine Law and the Law of Nature, so that the study of Law in general is the business of men and angels;" and further, that "Angels may desire to look into both the one and the other, but they will never be able to fathom the depths of either." He expresses his opinion that "of all the Laws by which the Kingdoms of the earth are governed, no Law comes so near this Law of Nature and the Divine Pattern as the Law of England." We are informed that "the first Saxon Laws after Austin the Monk was sent hither by Gregory the Great for the conversion of this nation, were made by Æthelbert the first Christian King, who began his reign in 561," a date which Mr. Welles in his above epitome of the Judge's charge appears to have accurately reported. Others of his observations upon this occasion—the collection of the Saxon Laws by Alfred, and his adaptation of them to the entire nation, and his expression of opinion that "the Ten Commandments were once reputed part of the Common Law of England"—also find a place in his preface. His pressing recommendation to the assembled Justices "to take the examination of felons, for when they come to Gaol they have other stories put into their heads," is remarkable as affording some insight into a practice but little in accordance with the spirit of the present age; there being in our times no rule of the Criminal Law more strictly and jealously enforced than that which forbids a magistrate to receive the statement of any person accused of an indictable offence until he has been fully warned that whatever he chooses to say will be committed to writing, and may be given in evidence against him at his trial.* His remarks upon this head, however, appear to have had so little weight, that we find the learned Judge at the following

* 11 & 12 Vict. c. 42, s. 18.

Assizes adding force to his hints by the infliction of a fine upon an erring and careless Justice, who appears to have persevered in the sin of omission in this important particular.

The Quarter Sessions held October 4th, Mr. Cox, of Gloucester, Chairman, appear to have afforded no material for observation.

At the Quarter Sessions held on the 10th January following, Mr. Delabere, Chairman, a question was "strongly argued" between Mr. Brown and Mr. Brierton (two of the Counsel of the Sessions' Bar) "Whether a person should be admitted for a witness, in the controversie of a settlement between two parishes, who was one of the most considerable payers in a third parish, upon which the foregoing witness seemed to fix him, (the pauper,) and upon which it was said he must be fixed if it (the decision of the Court) went against the evidence of the person then to be sworn. Mr. Brierton argued he swore directly for himself, and to keep a charge off his own parish, therefore was not to be admitted. Mr. Brown said he was in no way concerned in the cause then before the Court, or in the two parishes then litigating; and therefore his evidence was not to be rejected for a remote possibility or probability. And he averred his evidence would be admitted in any Court. The Court did hear him (decided the point in his favour). And the case was that of a boy that lived with a man six or seven years, but without any particular hiring, and had, I think, only victuals and cloths; whether it was a settlement? The Court was of opinion it was not. But I remember'd a case wherein a boy lived four or five years so: he was at first designed to be bound apprentice, but never was, nor hired at all. I was then of opinion it could be no settlement, but 'twas referred to the Judges, and they said it was. I mentioned this, and Mr. Brown said the reason of the Judges' opinion in that case was because he lived as an apprentice, tho' he never was bound. I could not apprehend the reasonableness of that reason." The former decision upon this point by the Court of Quarter Sessions, its confirmation by the Judges to whom it

was referred, and his own disapprobation thereof, were contemporaneously recorded by Mr. Welles, as mentioned in our former article, and he finishes his observations upon the above case by a triumphant reference to his note of the former one, taking especial care to add that Sir Richard Cocks (whose strenuous opposition to his own views he does not appear to have forgotten) officiated as chairman upon that occasion.

The Judges of the following Assizes, held Monday, March 13th, were Mr. Baron Montague and Mr. Justice Fortescue Aland. Again Mr. Welles gives us a careful summary of the charge of the latter. "Judge Fortescue," says he, "speaking of the excellency and antiquity of our laws, (as in his charge last Assize,) added that our ancestors were much more strict in observing the Lord's day than we, and the law was more severe against the prophanation of it. He said masters had then a propriety in their servants; and iff any master set his servant to work on the Lord's day he was to loose his propriety in him and let him go free. And iff any, being free, work'd of his own accord, he was doom'd to servitude. He said he could tell us one thing which he thought was new to us, (as indeed it was, and I find to every one else,) and I believe to himself too, till a case came before them in the King's Bench, which revived an old law, and published an almost unknown law. It was, that some Justices of London and Middlesex entered into a gaming house, and imprisoned or demanded sureties of the gamesters and keeper of the house. This proceeding they founded upon 33 Hen. VIII. c. 9, (however they hit upon it,) and it was brought before the King's Bench, and there argued. For the criminals 'twas pleaded the statute was only to encourage archery and the use of long bows, when those sorts of weapons were in fashion, and so was for the military strength of the nation. But those things being of no use in war now, the statute itself is obsolete, and as it were expired. But the B: R: confirmed the act of the Justices; and say 'tis for the suppression of all unlawful games. And that any Justice of Peace may enter a house

suspected of gaming; and imprison all they find playing till they find sureties to play no more; and the master of the house till he find sureties to keep such unlawful gaming house or place no more. That iff the door be shut, he may demand entrance, telling the occasion; and if he be refused may break it open. The Judge said further, that iff a Justice did not think fit to go himself, he might send a constable, but then he could not oblige them to find sureties, but must take their own recognizances. He observ'd of what great use the execution of this Act would be; and said it had already suppress'd half the gaming houses in London. He again pressed the Justices to take always the examination of criminals and witnesses, and fin'd Mr. Masters 5 li: for not doing it. (But I suppose he will take it off again.) He mention'd Dr. Wilkins' book of the old Saxon laws which is coming out; and begins, I think, at the above mentioned year 561, and carries down our laws, I believe, to Magna Charta, 9 Hen. III., which is about the year 1225, where our Statute Books begin."*

With respect to the question raised in the King's Bench upon the 33 Hen. VIII. c. 9, as above related, it may be observed that the argument in favour of the wrongdoers, that the Act, being for the encouragement of archery, was inapplicable to the case, was a somewhat desperate one, it being expressly enacted by sec. 14, that "all Justices of the Peace, &c., may enter all such houses, places, and alleys, where such games (bowling, coyting, colysh, cayls, half bowls, tennis, dicing-table, carding, or any unlawful game then or thereafter to be invented) shall be suspected to be holden, &c., and as well the keepers of the same as also the persons there haunting, playing, &c., may take, arrest, and imprison, until the keepers, &c., have found sureties to the King's use, &c., no longer to use, keep, &c., such house, &c., and also that the persons there found be in like case bound by themselves or with sureties no more to play, &c., at any of the same games."

* This book was published in 1721, the name of the Hon. John Fortescue Aland, Esq., one of the Judges of the King's Bench, appearing in the list of subscribers.

This Act may now be said to be obsolete, although it does not appear to have been ever expressly repealed. It is entitled "An Act for the Maintenance of Artillery and debarring unlawful Games." Common gaming houses are now within the 2 & 3 Vict. c. 47, s. 48, (the Metropolitan Police Act,) by which commissioners of police are empowered to authorize superintendents and constables to enter houses suspected to be used for purposes of gaming, and to seize and destroy tables, &c. This Act further renders the owners or keepers of such houses liable to a penalty not exceeding £100, or six months' imprisonment; and persons found in the house without lawful excuse to a penalty not exceeding £5, and, moreover, provides that proof of gaming for money, &c., shall not be necessary in support of information.

The Quarter Sessions, held April 18th, 1721, Mr. Cox Chairman, seem to have offered nothing more remarkable than a dispute between Mr. Harrison, the Minister of Cirencester, and his parishioners, concerning the ratability of certain small tithes and "an annuity of £30 li: issuing out of Oakly Wood and Oakly Farm," but which could not be decided by reason of "a fundamental flaw in the matter, started by Mr. Harrison's attorney."

At the Quarter Sessions, July 11th following, a great debate arose whether certain Justices whose allowance of a poor-rate had been sought, and who declined to sign it upon the ground of inequality, were or were not compellable to do so. No conclusion appears to have been arrived at, but it is stated that, "it seeming unreasonable to suppose that the Act 43 Eliz. c. 2, requiring their concurrence to a rate, intended to make them only tools and cyphers, several were of opinion that the Justices might alter it, and that 'twas more proper for them to alter what they disliked than to refuse signing it, because of the great inconvenience that might arise therefrom." *The King v. The Justices of Dorchester*, 1 Strange, 393, decided in the Michaelmas term following, effectually sets at rest any doubts that might hitherto have existed upon this

point. There a mandamus issued to the Justices to sign a poor-rate, but before the return a motion was made to supersede it for several objections to the fairness of the rate. The Court were of opinion that the concurrence of the Justices was a mere matter of form, and the supersedeas being denied, the Justices returned that they could not allow the rate, it not being a just and proper one; whereupon the Court, having already given their opinion upon this head upon the motion, resented this step so far that they quashed the return, and ordered an attachment against the Justices, who thereupon submitted and returned *quod ratam allocavimus*. And in a recent case, *Regina v. Lord Yarborough*, 12 A. & E. 416, it was held that the 6 & 7 Wil. IV. c. 96, s. 1, which provides that no rate shall be allowed by Justices unless it be made upon the estimate there prescribed, makes no difference in this respect.

The Judges of the Assizes held Monday, July 24th, were Lord Chief Baron Bury and Mr. Baron Montague. "Judge Montague," we are told, "was very angry about the highway that leads from Creeklade (Crickley) Hill to Gloucester, and examined the surveyors in Court whether they had done their duty and presented to the Justices in their Petty Sessions the condition of their ways. He said two things which are contrary to common practice, and we had some discourse with him about. The one was, that subsidy men (which he said as have 40s. a year lands, or 5 li: in goods, &c.) are to find two men to work at the highways. The other, that 50 li: a year being generally esteemed a plow-land, for which a man is liable to find a team to the highway; he that has 100 li: a year, being two plow-lands, must find two teams. This, I think, is never done unless he keeps two teams."

Four days earlier than the date of the above note we hear of Mr. Baron Montague from another source. Sir Erasmus Phillipps mentions in his Diary kept by him when he was an undergraduate at Oxford, that on July 20th, 1721, he attended the Nisi Prius Court at the Oxford Assizes, where Baron

Montague tried sixteen causes. He also furnishes a list of the counsel in attendance, who appear to have been Serjeants Grove and Bridges, Mr. Winnington Jeffreys, Mr. Wills, (King's Counsel,) Mr. Clement Weard, (Wearg,)* Mr. Cox, Mr. Wright, Dr. Blochiers Tovy, (Fellow of Merton College,) Mr. Skinner, Mr. Joseph Girdler, Mr. Le Marchant, Mr. Brereton, and Mr. Edmd. Probyn. Of these he tells us Mr. Jeffreys, Mr. Wills, and Mr. Probyn were Welsh Judges.

Nothing deserving of notice appears to have occurred at the Quarter Sessions held respectively October 3rd and January 9th following. Mr. Cox is mentioned on both occasions as Chairman.

The ensuing Spring Assizes were held March 12th, before Mr. Baron Price and Mr. Justice Dormer. The latter judge "sate on the Crown side, and had a great deal of business. There were thirty-nine prisoners in the calendar, and above twenty of them, I believe, for capital crimes. Ten were condemn'd, six of them I think of the gang of housebreakers about Bristol side, where robberies have of late been so frequent and rogues so numerous that some gentlemen have thought fit to keep watches and guards about their houses. John Coopy was condemn'd for the murder of Margery Collie: whom he first got with child and then poysoned to conceal his shame: three were reprieved: seven executed, among them the said John Coopy."

These learned Judges are also mentioned by Sir Erasmus Phillipps, as holding the Assizes at Oxford on March 7, 1721, where he informs us there were six causes only in the Nisi Prius Court.

The Quarter Sessions intervening between these and the ensuing Assizes appear to have afforded Mr. Welles no materials for his journal beyond a few settlement cases.

At the Assizes held Monday, July 16, 1722, the Judges were Lord Chief Baron Montague (who since his last appearance at Gloucester Assizes has become chief of his Court) and Mr.

* Appointed Solicitor-General 1724, and died the following year.

Justice Dormer. It was upon this occasion that Pitt, of Gloucester, was indicted for breaking the arm of the King's statue, as we have already noticed in our former number, and "traversed the indictment to try it at next Assizes." We learn also "that another of the Bristol gang was condemn'd for burglary."

At the Quarter Sessions held October 2nd, 1722, Mr. Cox, of Gloucester, Chairman, a few unimportant settlement cases are mentioned. The following entry also occurs:—"Talking in the chamber before dinner came up, Mr. Brown (counsel) said an order of bastardy was quashed in the B: R: for that last common clause whereby the putative father is required to find security for obeying the said order. They said he was not obliged to give security for obeying the order till he had broken it. This seemed strange to me, and I think to all of us; for we always took it to be an essential part of the order: and I am sure 'tis a most necessary part of it. For iff a father of a bastard child be not to give security till he has broken the order, he will be sure to run away whenever he breaks it; and so all bastard children may come upon the parish."

At the Quarter Sessions held January 15th, 1722, Mr. Welles tells us that "Mr. Cox being laid up with the gout, and no other Justice there at the beginning but Mr. Archdeacon and myself, we had no Chairman. Mr. J. Stephens, of Lupiatt, came a little before dinner, and Mr. Kingscoat appeared next day, but Mr. Archdeacon at last went into the Chair the second day, so he was Chairman, iff anybody. We had very little business; not one appeal but an adjourned one; we burnt three in the hand; nothing that I observ'd material was debated, or came before us. Only upon trying Thomas Lynk, who was committed for pig stealing, we had a long debate whether the Court and Jury believing him guilty, and the evidence not proving him guilty, he ought to be found guilty? We all believed him guilty; we all thought the evidence did not amount to a legal proof against him; Mr. Kingscoat,

however, argued that if they believed him guilty they ought to find him so, and talk'd very warmly upon it against all the rest of the Court, counsellors, attorneys, and all, who were eight or ten in number, and all unanimous in the contrary opinion. But 'twas left entirely to the jury, and they acquitted him."

The custom of burning felons in the hand above alluded to, took its rise in the days when the *privilegium clericale* began first to be extended to the laity. The law, as it originally stood, suffered no man convicted of felony to claim the benefit of clergy but such as had *habitus et tonsuram clericalem*. In process of time, however, a much more comprehensive meaning became attached to the word, and every person who could read (in those days no slight accomplishment) was accounted a clerk, and admitted to the privilege of clerkship, though not in orders. But in course of time the invention of printing and other concurrent causes gave a considerable impetus to learning; the leaden sceptre which ignorance had extended over the land was partially withdrawn, and a capacity for reading ceased to be any longer a proof of clerkship. So many persons, in fact, began to challenge this right, that it was quickly found that at least as many laymen as clergymen were annually rescued from the fangs of the secular Court, and turned over to the toothless jaws of the canonical law. Therefore, by statute 4 Hen. VII. c. 13, a distinction was once again made between the clergy and the learned laity, and although the privilege was continued to the latter, it was in a modified form, the culprit being subjected to some slight punishment, and not permitted to claim the benefit of clergy but once. The statute directs that no person unless he produce his orders shall be admitted thereto a second time, and in order to distinguish between lay and clerical offenders, it is provided that all persons of the former description who shall be allowed the benefit of the privilege are to be burnt with a hot iron in the brawn of the left thumb. This distinction between learned laymen and clergymen was afterwards for a time abolished by 28 Hen. VIII. c. 1, and 32 Hen. VIII.

c. 3; but is said to have been virtually restored by 1 Edw. VI. c. 12, which *inter alia* confers upon *lords of Parliament and peers of the realm* the benefit of peerage (equivalent to that of clergy) for the first offence, although they may not be able to read, and without burning in the hand, for all offences then "clergyable" to commoners, and also for the crimes of *house-breaking, highway robbery, horse stealing, and robbing of churches*. Their lordships are now deprived of this privilege by the 4 & 5 Vict. c. 22, which enacts that upon conviction for felony such persons shall be punished as any other of Her Majesty's subjects.

Of the lame and inefficient mode which formerly prevailed of bringing a clerical offender to justice much may be learned by a perusal of the case of *Searle v. Williams*, 288 Hobart. The practice which then prevailed in the Ecclesiastical Court appears to have been as follows:—The offender claiming benefit of clergy, and consequent immunity in the King's Courts, was solemnly arraigned before the Bishop or his deputy and a Jury of twelve clerks. The accused was first required to make upon oath a declaration of his innocence of the crime laid to his charge. This being done, twelve compurgators (as they were termed) upon oath declared their belief of the truth of his denial. Witnesses (on behalf of the prisoner only) were next examined upon oath, and lastly the jury (also upon oath) had nothing to do but to acquit the prisoner. In the case above mentioned Lord Chief Justice Hobart gives vent to his indignation in no measured terms. "The perjuries indeed," says he, "were sundry; one in the witnesses and compurgators, another in the jury compounded of clerks and laymen; and of the third the Judge himself was not clear, all turning the solemn trial of truth by oath into a ceremonious and formal lye."

The Judges of the Assize held March 9th following were Mr. Baron Price and Mr. Justice Fortescue Aland. The latter of these learned Judges, who appears to have been a gentleman of urbane manners and communicative disposition,

(we have a notion that in his courteous bearing the late Mr. Justice Talfourd must have strongly resembled him,) takes notice that all persons having business at the Assizes "are bound to attend the first day; that the whole Assize was reckoned but as one day, and their records and all matters relating to the Assizes made up accordingly, and would be faulty if they were not, as at the Assize held March 9th.

"In his charge mentioning that common maxim, that the King can do no wrong, and the reason of it, because he acts by his ministers, to whom he has delegated his authority, and therefore can't so much as commit a man to prison. He said King James II. did commit a man by a warrant signed with his own hand, and the man brought his Habeas Corpus and was discharged by the King's Bench."

"There is a short Act, 6 Geo. R., whereby Justices of the Peace may commit criminals for petty larceny and small offences to Bridewell. Mr. Cox asked the Judge whether this was to be all their punishment, or whether they were to be indicted and prosecuted afterwards. He said they must be prosecuted. So that the Act makes only the Bridewells, Gaols in which little criminals may be kept till the Assize or Session.

"The Judge told me a case which was lately argued at the King's Bench, which it might be proper for a Justice to know. A Justice of the Peace convicted a man for killing a Hare upon his own confession: upon the Stat: which says only upon the oath of one witness he shall be convicted, but does not mention confession. Judge Eyres, he says, seemed to be of opinion that the conviction was wrong; that they must keep to the very words of the stat: but was not very positive in his opinion. But all the other three Judges were against him. They said confession was the strongest evidence in the world: that the Act could never be intended to exclude that; and therefore the Justice did right to convict him.

"He settled me in one point which I believe I have heard the Judges themselves deliver differently, to wit, whether stealing to the value of twelve-pence be grand or petty larceny.

I think I have heard it said sometimes that twelve-pence or above is grand larceny, sometimes that it must be above twelve-pence to make it grand larceny. He said, as I remember L. Ch. Just. Cook did once affirm, 12*d.* to be grand larceny, but afterwards corrected it as a mistake, and says 'tis but petty larceny. And so he delivered it in his charge, and told me afterwards in discourse with him about it, when I said I thought I had heard it both ways, what L: Ch: J: Cook had writ.

“He told me it had been a question (I know not whether he said argued in the King's Bench) whether one Justice of the Peace had an authority over another so as to put the laws in execution upon him, (suppose for prophane cursing and swearing,) *Quia inter pares non est superioritas.* But he said if a Justice breaks the Law he ceases to be a Justice *quoad hoc*, and another Justice may inflict the penalty of the Law upon him.”

We learn also that at these Assizes five criminals were condemned: a woman for murdering her husband by stabbing him in the belly, another for the murder of her bastard child, a man for stealing sixteen yards of broadcloth out of a clothier's shop, Zechariah Cam for housebreaking, and a boy for stealing a horse. We are further informed that Elisha Pitt, who had traversed his indictment at the last Assizes, “was found guilty of breaking the arm of the King's statue, fin'd a hundred pound: to lie in prison six months, and find sureties for his good behaviour for a year.”

The Quarter Sessions held respectively April 23rd and July 16th, 1723, on both which occasions Sir Richard Cocks was the presiding magistrate, offer nothing worthy of notice, except that on the latter occasion “an appeal was brought against a judgment given by two Justices (Dr. Lye and Mr. Crawley) for 10 li: upon a man for concealing soap.” It was insisted however upon behalf of the exciseman, that an appeal did not lie, and Mr. Welles reminds the Court of a similar case, upon a former occasion referred to, Blencowe and Dormer

J. J., who gave it as their opinion, "that an Appeal did not lie by the words of the Act unless by implication." "But," he indignantly adds, "Sir Richard Cocks would not be govern'd by Judges, and would hear the appeal, and did." Mr. Welles is however enabled to record the fact, which he appears to have done with great satisfaction, that, with the exception of Sir Richard himself, the bench were unanimous in confirming the judgment.

At the Assizes held August 8th, 1723, the Judges were Lord Chief Baron Montague and Mr. Baron Gilbert. It was upon this occasion that the latter of these learned Judges in his charge observed (as we have had occasion to mention in our former article upon this subject) upon the folly and madness of those who desired a Roman Catholic King "to govern a free and Protestant country." Speaking of homicide, the learned Judge takes occasion to observe, "that when two persons drew suddenly upon each other there seemed to be something of self-defence in each: and that mitigated the crime, and made it but manslaughter. Which," says Mr. Welles, "seem'd to me a better account of the matter than what I think I have heard come from other Judges, to wit, that the law so far indulg'd the passions of men. But when two men draw suddenly it may be hard to determine who is the aggressor, and so there may be something which looks like self-defence in the other whichever is killed; and upon that score it may be reasonable to lessen the crime. But this cannot be, as I think he observ'd, where there is a challenge going before, for there there is malice prepense, and it can be no less than murder."

Speaking of perjury, the learned Judge remarks, that "tho' 'tis a most hainous crime our laws had not yet made it death," (a somewhat ominous expression, as showing a tendency on the part of the Legislature at this date to add to rather than diminish the catalogue of capital crimes,) "and the best reason he could ever learn for it was, least it should deter people from speaking the truth. For in many cases the terrour of

death might so overawe them that they might be afraid to utter the truth, and especially where great or malicious men were concerned, who would by all ways seek revenge."

At the Quarter Sessions held October 8th, Sir Richard Cocks, Chairman, the Court has to deal with a conscientious but obstinate person, who being subpœnaed to give evidence concerning his own settlement, professed his readiness to bear testimony upon oath, but without kissing the book. "His reason," says Mr. Welles, "was because he found it written in Scripture, thou shalt swear by the Lord, without kissing the book. I took a deal of pains with him, but it seemed to little purpose, so he was committed. But at last not liking the gaol he comply'd. And they say he was a teacher of a new sect, which this accident has quite broke, and lost him his congregation." Mr. Welles has also to record another instance of what he evidently considers unseemly positiveness on the part of Sir Richard Cocks, in a settlement case, the details of which, however, are not of sufficient interest to demand attention.

The Spring Assizes were held March 7th, before Mr. Justice Dormer and Mr. Justice Fortescue Aland. "I did not observe," says Mr. Welles, "anything very material this Assize. Judge Dormer gave the charge, and tried a great number of prisoners; condemned seven, but reprieved four. Terry discovered a great many burglaries, but having been so bad himself his evidence was little regarded; tho' in relation to some supported by strong circumstances. A great many ale-house keepers appeared to be concerned, and though acquitted, were presented afterwards by the grand jury, to the number, I think, of seven or eight; the Judge ordered Walter Edwards, of Tewkesbury's House, to be suppressed, and most or all, I think, were obliged to find suretys for their good behaviour before they were let out of gaol. Marshall, Pratt, and Watkins were executed."

At the Quarter Sessions held April 14, 1724, Sir Richard Cocks, Chairman, a settlement case between Prestbury and

Bridge Boat, or Bridge Sollers, in the county of Hereford, was heard, which proves unquestionably that in those days paupers were not treated with too much tenderness and consideration, and that litigating parishes were not over-nice in the choice of weapons they employed against each other. "The case was, Samuel Stinton and Elizabeth his wife were (upon the oath of the said Samuel both as to his marriage and settlement) removed in 1715 by order of two Justices, Mr. Delabere and myself, from Prestbury to Bridgeboat: that order being never appealed against (upon oath of the service of it and delivery of the persons) was confirmed at the Sessions. Samuel Stinton went thence with his said wife to Bristol, and liv'd there with her five years, working at his trade, (being a blacksmith,) and had by her three children; two died, one, Joseph, is living.

"After five years Samuel left his said wife and child, and went to London to work, and sent his wife three letters to come after him: but she sent him word she had no money to pay for her journey or his letters, and therefore, unless he would send her some, desired him to write to her no more. Since which she has not heard from him.

"Elizabeth his wife, with her son Joseph, hereupon went back to Bridgeboat, where the officers refused to receive her, told her she was no parishioner there, gave her a crown, and conducted her out of the parish, and so forced her with her said son to turn vagrants.

"They were taken in Prestbury, wandering and begging, and (she upon oath declaring herself the wife of Samuel Stinton sent and left as above) were sent by pass by two Justices (Mr. Delabere and myself) to Bridgeboat aforesaid.

"Being brought thither by the said pass on a Monday, the constable of the said parish (John Garroll) carried them the Saturday following to Hereford, and lodged them there till Monday following: then sent them by two men and horses, who took them up, brought them again to Prestbury, set them

down at the inne, and pretending to go and look after the overseers of the poor, rid out of the town by a back way.

“They were taken up a second time in Prestbury wandering and begging: and then sent by the sd Justices to Bridewell, and there kept to the Sessions following, when it was thought fit by the Justices to send them again to Bridgeboat by a fresh order: which was done by Mr. Cox and myself. Against this order Bridgeboat appeals. Says the name of their parish is not Bridgeboat but Bridge Sollers: but Prestbury proving by a man that was born and bred and lived above twenty years within four miles of it that it went usually by that name: that he had never heard it called Bridge Sollers, but always Bridge, or Bridgeboat, their Council, Mr. Brierton, gave up that, and thought there was nothing in it. Then they brought the woman to swear she was never married. But her oath to the contrary is upon record against her, as well as the order founded upon her husband’s oath. And whether she were or not can’t be disputed now: the first order must be conclusive, and they can’t enter into the merrits of that or aver against a record. It was said the son was not in the first order: but that was not much debated: if the parents have their settlement then the child must, or where ’twas born if they make it a bastard. But Sir Richard Cocks was willing to have it referred to the Judges. Tho’ what is referred I can’t tell, unless it be the whole case: for it went off very abruptly, at least as I thought.”

On July 25th, the Assizes were held before Mr. Baron Gilbert and Mr. Justice Raimon (Raymond). “John Tawney, of the Golden Harp, near Gloucester, was convicted and executed for breaking open Mr. Lillington’s stable and stealing two horses. He attacked the Worcester coach on Broadway Hill, but was frightened by the boldness of a Captain that was in it: so that he did not rob it. He was to have been tried for a robbery on Sanny Downs, but they could hang him but once and so did not try him on that. Charles Terry was

removed to Worcester, and there tried for robbing Ombersley church, and a house near Pershore, upon Smith's evidence, one of his companions, and there acquitted of both Indictments.

"The Councill attended the Judges on the case referred to them at Easter Sessions betwixt Prestbury and Bridgeboat, als Bridge Sollers in the county of Hereford. Judge Raimon said he did not care to give his opinion where they might choose whether they would stand by it or not," (the disregard shown to the opinions of two learned Barons of the Exchequer upon a settlement question above referred to, may possibly have influenced the learned Judge in arriving at this conclusion,) "but iff they would bring it into the King's Bench, he would there give his opinion and make them stand by it. But told them an order once made and not appealed against at the next Sessions was final. That its being confirmed at Sessions (tho' it was so) signified nothing. It would have been all one iff it had not. It confirmed itself.

"I went after to Worcester Assize, to get off Terry, and there heard the Tryal in a case of Simony for the Rectory of Pebbleton, in the county of Worcester, where it was plainly proved that Mr. Hart, the incumbent, had by note engaged to pay 100 li: for the presentation to the said living to Mr. Rickets, of Pershore, for the use of a kinswoman (Mrs. Hammond) of Mr. Dingley, the patron: and likewise to acquit an estate Mr. Dingley had in his hands of all Tythes: that the 100 li: note was afterwards turned into a bond, and 50 li: of it paid to Mr. Rickets, and by him to Mr. Dingley himself. The case was very clear, and the Jury found for the King."

At the following Quarter Sessions, held October 6th, Sir Richard Cocks, Chairman, the order for removing Elizabeth Stinton above mentioned from Prestbury to Bridge Sollers, als Bridgeboat, was confirmed as to her, but quashed by consent as to her son Joseph Stinton.

The following Spring Assizes were held March 6th, before Mr. Baron Price and Mr. Justice Denton, and the latter of these learned Judges, "who," we are informed, "sate at the

Crown end, gave a very good charge." The expression "Crown end" is suggestive of the practice which then prevailed of disposing of both civil and criminal business at Assizes in one and the same Court. The abolition of this custom, the inconvenience of which was long acknowledged, was hastened, it is said, by some such occurrence as the following. Several of the jury before whom a man arraigned upon a capital charge was taking his trial suddenly electrified the presiding Judge by bursting into a hearty and uncontrollable fit of laughter. The case under consideration being one the details of which afforded but slender materials for mirth, his Lordship was at some pains to discover the reason of this unseemly ebullition, and at length, not without difficulty, elicited that the offending Jurors finding metal more attractive in a horse cause under trial at the other end of the hall, had transferred their attention from the case before them to certain caustic and facetious observations of a learned counsel in the latter cause upon the immoralities and shortcomings of horse dealers in general, the result of which was the temporary obliviousness of their own proper duties, and the complete overthrow of the gravity the occasion demanded.

Mr. Justice Denton, who appears upon this occasion for the first time at the Gloucester Assizes, was appointed a Justice of the Common Pleas, June 25th, 1722, *vice* Sir John Blencowe, who then resigned the post he had held in that Court since 1697.

At the Quarter Sessions held July 13th, 1725, Mr. Cocks was the presiding Justice. "In discourse at dinner," says Mr. Welles, "Mr. Payn said a nice case came, I think, before the King's Bench. A man's bed stood so that he lodged in two parishes at once. The question was, where his settlement should be? Mr. Justice Fortescue said where his head lay, as being the more noble part. And so I think 'twas determined."

A remarkable case appears to have been tried at the Assizes held August 14th, before Lord Chief Justice Eyre and Mr. Serjeant Hale, of which it is impossible to read Mr. Welles's

account without fully indorsing his observation as to the injustice and hardness of the case. "I observed," says he, "nothing very material at this Assize : there were a great many causes, very few criminals. Lieutenant Cavendish was tried for killing Cornet Gilburn, at Tewkesbury. It appeared they were good friends, that Gilburn came into Cavendish's chamber with his sword and cane in one hand, and a candle in the other, between eleven and twelve at night, when he was in bed ; sate at his bedside a great while and talked of several things, but his business was to borrow 30 li : which he, as he was an extravagant man, had spent it seems of the troops' money, and could not tell how to pay it. Cavendish refused to lend it, unless Gilburn's unckle (a captain, I think, in the same regiment) would be bound for it ; upon this Gilburn gave him ill language and drew his sword, pointing it to Cavendish's breast, but upon his telling him how shamefull it was to draw upon a man in bed, he put it up again. But soon after he drew it again, and fetched Cavendish's his sword off the table, and threw it upon the bed, and told him that must decide it. Upon which, Cavendish rising, fought him in slipshoes and only white stockings and breeches on, and happened to run him into the belly, of which he dyed on Friday following, this being on Sunday night, or about one o'clock on Monday morning. Cavendish was found guilty of manslaughter, to which the Judge in his direction seemed most to incline. But 'twas thought exceedingly hard by all that heard the tryal : he being forced out of his bed, unless he would have been murdered in it, and Gilburn himself owning to the doctor and chirurgeon both that 'twas his own fault, that he drew upon him first, and bid them tell the Judge so, and that he forgave him. So it seemed to be in his own defence as much as possible." What sentence was passed upon this unfortunate gentleman, and whether it was inflicted or remitted, we are not informed.

At the Quarter Sessions held October 5th, Mr. Cox, of Gloucester, Chairman. "the Act for relief of insolvent Debtors

supplied us with some business; about twenty of them being discharged." At this period the only relief afforded to insolvents was an occasional Act of Parliament, whereby all persons whatsoever who were not included within the bankrupt laws were discharged from all suits and imprisonment upon delivering up their estate and effects to their creditors on oath at the Sessions or Assizes. Subsequently to the Act above referred to, and for a similar object, were passed the statutes 28 Geo. II. c. 13, 32 Geo. II. c. 28, 1 Geo. III. c. 17, and 5 Geo. III. c. 41.

Mr. Justice Dormer and Mr. Justice Fortescue Aland were the Judges of the Assizes held March 12th. It was upon this occasion that the latter of these learned Judges, as we have had occasion to notice in our former article, directed that in presenting scandalous or seditious books care should be taken to single out certain obnoxious passages contained in the books, instead of presenting the books themselves, or by their titles, as no indictment would lie in the latter case. We further learn that Patrick Conway, alias Conolley, and Thomas Johnson, were convicted and executed, March 30th, for returning from transportation, and that "thirty-nine causes were tried before Judg Fortescue."

Of the amount of civil business on the Oxford Circuit some four-score years before Mr. Justice Fortescue Aland held the above Assizes, and disposed of his thirty-nine causes, we gather much information from a perusal of "Whitelock's Memorials" for the years 1647 and 1648. Mixed up with the doings of Cavaliers and Roundheads, the movements of Cromwell, Fairfax, Massey, and other actors in the bloody drama, which "ran" so long and terminated so tragically, we stumble upon such entries as the following,—the earliest of which bears date, August 2nd: "This morning the trials were all despatched at Abingdon; there were put in thirty-four records, and I was retained in thirty-nine causes." (The number of Whitelock's retainers, as compared with the cause list, is strongly suggestive of "settlements out of Court.") At Oxford

the civil business was over on the 4th, fifty-one causes (in fifty of which Whitelock was retained) having been disposed of. Expedition in all matters relating to the administration of the law seems to have been the order of the day. "The Judges," writes Whitelock, "hastened out of town, and after dinner the lawyers went to Burford, twelve miles from Oxford, and lay there this night; it was now my turn, being most ancient of all the lawyers who rode this Circuit, in the Circuit to be (as they stiled me in those times of war) their General; I was to appoint their quarters, and my opinion swayed in our private affairs." At Gloucester seventy-seven causes were entered, Whitelock being retained in thirty-five of the number. On the 14th, "the Judges sat at Hereford, but the people came not in, so that there was but little to do either for Judges or lawyers, and the Judges, especially Clerk, were very froward upon it." Nevertheless, he tells us afterwards, "the records put in to be tried were forty-eight, and I was retained in twenty-nine causes." We next hear of the Circuit at Shrewsbury, where (on the 20th) "the Judges sat early for the trials, and I was wearied with very much business, and glad of it." On the following day the High Sheriff entertained the Judges and the bar "very nobly." Then occurs the following notice of a gentleman who appears to have mingled "the trade of war" with the practice of the law, a union which we who live in the days when the drill serjeant reigns supreme in the Temple Gardens, and the sober denizens of Gray's Inn are daily frightened out of their propriety by bugle call and the measured tramp of the "Devil's Own," cannot fail to realize. "Colonel Mackworth, who was the Governor of Shrewsbury, is a gentleman of an ancient family in those parts, a sober and discreet man, and a very good lawyer: he was in the greatest practice at these Assizes of any man, and after the Assizes ended put off his gown and accompanied me to the castle where he was in the posture of governor, and shewed me all his fortifications and stores." Here the number of the causes tried amounted to seventy-five,

Whitelock being retained in thirty-eight of the number. Of Stafford Assizes, which were the next in rotation, we have no account, but at Worcester forty-two causes were entered, in thirty-six of which Whitelock was retained.

On the following circuit, in February and March, 1648, there appears to have been a general increase even upon this very considerable number of causes. At Reading there were forty-four causes, at Oxford thirty-five, Gloucester ninety-nine, Monmouth ten, Hereford fifty-three, Shrewsbury ninety-nine, and at Stafford seventy. This was Whitelock's last circuit, he having while in attendance at Gloucester Assizes received his appointment as a Commissioner of the Great Seal.

We cannot lay down these valuable "Memorials" without bringing the following extract to our readers' notice, which, inasmuch as it hints at the growing Puritanism which became afterwards so rampant and worked such frightful mischief, we insert here, even at the risk of being thought impertinent. "At the Quarter Sessions at Oxford," says Whitelock in his notes for the year 1635, "I was put into the Chair in Court, tho' I was in coloured clothes, a sword by my side, and a falling band, which was unusual for lawyers in those days, and in this garb I gave the charge to the Grand Jury; I took occasion in this place to enlarge myself upon the point of jurisdiction of the temporal courts in matters ecclesiastical, and the antiquity thereof, which I did the rather because the spiritual men began in those days to swell higher than ordinary, and to take it as an injury to the Church that any thing savouring of the spirituality should be within the cognizance of ignorant laymen; yet I was wary in my expressions, and so couched the matter as it might seem naturally to arise from the subject of the discourse, and not to be brought in purposely by head and shoulders. The gentlemen and freeholders seemed well pleased with my charge and management of the business of the Sessions, and said that they perceived that one might speak as good sense in a falling band as in a ruff; and they treated me

at that time and at all times afterward, when I waited upon them, with extraordinary respect and civility."

At the general Quarter Sessions, held April 19th, 1726, Sir Richard Cocks officiated as Chairman. We are upon this occasion furnished with the following sample of the sort of "table talk" which prevailed at the period, among the bar and magistracy. "A young counsellor after dinner, as we sate at table, desired to know our opinion whether a Hayward was such a parish office as gained a man a settlement. Sir Richard Cocks presently answered, Ay: I replied, No:" (Sir Richard and Mr. Welles seem to have differed upon every possible occasion.) "It was, I thought, no parish office at all. Sir Richard founded his judgment upon the publikeness of the man's imployment, that all the parish had notice thereby of his being there, &c. I reply'd the Act of Jac. II. that required notice to be given to the churchwardens in writing, and afterwards that notice to be published in the Church before forty days should gain settlement, by the opinion of the Judges, bound them down to that very way of giving notice; and that no other notice which might be thought equivalent would do, though the notoriety might be so great that all the Parish must needs take notice of a man's being there. But I don't think that the reason, or however not the whole reason, and at most but a very small reason, of a parish officer's gaining a settlement. For, by putting a man in an office they as it were incorporate him into their body, and deliberately choose him for one that must go through all the burdens and duties of the parishioners, and so make him one. But a Hayward is no more than a servant (a shepherd, as Mr. Cook said) which they may hire or not as they please. And upon further consideration I think there is this great difference between them: that a parish officer is one that the law obliges them to have, and therefore they cannot be without. But a Hayward is a servant of their own making which they may have or not at their pleasure; and perhaps not one parish in ten has any such thing. And I think," adds Mr. Welles with evident

satisfaction, "all the Justices except Sir Richard were in opinion with me."

In justice to Sir Richard, however, it should be stated that Judges who administered the law long after his time, determined that a settlement was gained by a person who served the office of "hog-ringer," (the duties whereof appear to have been to attend the open commons, to see that all hogs turned thereupon were rung and to convey to the pound such as were unringed, receiving for such duty one penny, and sixpence for ringing each hog,) it being stated that the pauper was chosen and sworn in at a court leet, and that it was an office of great antiquity and serviceable to the parish. It seems not unreasonable, therefore, to claim for the hayward, provided he was installed into his office with the like formality and solemnity, the same privileges which were accorded to his brother official in the case of *The King v. The Inhabitants of Whittlesea*, 4 J. R. 807.

The Summer Assizes this year were held before Mr. Baron Price and Mr. Baron Carter. Mention is made of two cases of burglary, neither of which offers any features deserving of notice.

Mr. Justice Fortescue Aland and Mr. Justice Denton were the Judges of the Assize, held March 11th. "This," we are told, "was a great Assize for criminals. Giles Major, of Alstone, in the parish of Cheltenham, labourer, after a trial of almost four hours, and the examination of fifteen or sixteen witnesses, was found guilty of the barbarous murder of Francis George of the same place, by entering his house and cutting his throat, the 26th April last between nine and ten at night, just as he had eat his supper and was ready to go to bed; only, so far as appeared, out of a settled malice against him. He and five more were condemned; only he and one more executed."

At the Quarter Sessions held April 11th, 1727, a collision seems to have taken place between the bench and a recruiting party, of which the following account is given:—"We had a contest with some young officers, who pretended to have

enlisted a soldier (one Thomas Wright) at Cheltenham, the Thursday before, and brought him to Gloucester. The fellow was drunk, (at the George, I think,) and the officer and a sergeant came into him, and asked if he would serve the King. He refusing to serve him as a soldier, the officer bid the sergeant mind his business, upon which (as one of Charlton Ks. [King's] swore before Mr. Delabere and me) the sergeant went to him, lifted up the skirt of his coat, and put his hand towards his pocket, and soon after told him he was listed. The man denying it, the sergeant said he was, and had taken his money, a guinea, and 'twas in such a pocket. The man said he had nothing but brass in his pocket, and pulling it out a guinea was among it; so we were well satisfied the sergeant put it in unknown to the man. The officers had employed an attorney to draw up their information, sworn to by Mr. John Wells, who was, I think, the officer who beat up at Cheltenham, and one or two more, the substance of which was to show how fairly he was enlisted, and had owned himself to be so. And Mr. Payn moved the matter for them in Court. I sent for the Act 5 & 6 W. & M. and told Mr. Payn then, and three of the officers who came to us in the evening at the King's Head, when Mr. Delabere, Mr. Cocks, the Archdeacon, and myself sent to demand the man, that we would not dispute it with him whether the guinea was put into his pocket or whether he took it and put it in himself, or whether he was fairly as they called it or fowly enlisted; what I insisted upon was, he was not enlisted at all. That all their whole proceedings were illegal. That, by that Act, they were to have brought him before a Justice of the Peace of the Division, or High Constable of the Hundred where enlisted, before whom he was to declare his consent; and till then was not to be deemed a soldier, nor subject to any military punishment nor entered into the Muster Role, under penalty of false mustering (which is, I think, cashiering the officer offending, incapacity of any post civil or military, and 100 li. forfeiture). That Mr. Delabere and I were Justices of that Division, and to aggra-

vate the crime both at Cheltenham then holding a Petty Session, when this transaction happened: and yet without bringing him before us, they had taken him not only out of our Division, but out of our County into the County of the City of Gloucester: and then illegally imprisoned one of the King's subjects, kept him out of a bed from Thursday to Tuesday, and even handcuffed him. That this was such treatment as could not be endured by Englishmen, who always gloried in their liberties and in the excellency of their Constitution. So they thought fit to release the man. Mr. Cocks told me they would joyn the whole bench with Mr. Delabere and me in representing the case above, and so we had determined to do so by the next post iff they had not set him at liberty."

Mr. Baron Page and Mr. Justice Reynolds were the Judges of the Assizes, held July 22nd. "Judge Reynolds," we learn, "gave a very good charge, spoke off hand with good language and good natural oratory." Of the nature of his Lordship's observations, we have no account. We are further informed that "a fellow was hang'd in chains for barbarously murdering a servant-maid and robbing the house."

The following singular entry, bearing date January 9th, 1727, is the next which claims our attention:—"We met at Gloucester to hold the General Quarter Sessions as usual. But finding there was a new Commission and no Dedimus to swear us, we considered what to do. And, without going to the Boothal after dinner, called for the Clerk of the Peace to read the Commission: and after it was read told him we were ready to take the oath of office iff he had any authority to give it: but he saying there was no Dedimus, and producing a letter from his agent that he had often called at the Clerk of the Crowns, and was at last positively told that he would grant no general Dedimus, but expected all the Justices, as well old as new, should take out particular ones, we concluded we had no authority, and so held no Sessions. But resolv'd to draw up a letter to my Lord Berkeley (our Custos Rotulorum) to

represent the case, and the condition of the County. To desire him to consider the consequence of a County's being without authority, tho' but for a week or a day, and to make representation of it where 'twas proper. That iff the design of it was to make the old Justices who had serv'd the Crown so long at their own expence take out particular Dedimus's, 'twas an innovation we would never submit to. This was subscribed by all the Justices present, being ten : Sir John Dutton, Mr. Delabere, Mr. Cocks, Mr. Archdeacon, Mr. Colchester, Mr. Hyet, Mr. Guise, Mr. Stephens, of Lupyatt, Mr. Tho. Cook, and myself. And the Clerk of the Peace was desired to carry it up to my Lord and wait upon him with it."

We have the satisfaction of knowing that this anything but creditable attempt upon the pockets of the Justices which seems to have been made at the issuing of the new Commission at the accession of that most money-loving of Monarchs George II.,* did not succeed. Mr. Welles subsequently writes, "The Clerk of the Peace upon his return brought down a Dedimus, and I was sworn January 30th."

The following Spring Assizes were held, April 6th, 1728, before Mr. Baron Carter, Mr. Justice Probyn, the other of the Circuit Judges, for some unexplained reason, not coming to Gloucester. There is an account of the trial of an anonymous case between the heir-at-law of an estate and the devisee, the result of which is not given, but may, perhaps, readily be guessed at from the circumstance of the Judge having ordered the four witnesses who were called to prove the will to be indicted for perjury. Three persons were condemned, among them Ralph Phillips, for demolishing turnpikes. He appears, however, to have been subsequently reprieved.

The following Assizes were held August 3rd, before Lord

* Upon one occasion Mrs. —, one of the bed-chamber women with whom the king was in love, seeing him count his money over very often, said to him, "Sire, I can bear it no longer ; if you count your money over once more, I will leave the room."—HORACE WALPOLE'S *Memoirs*, vol. i. p. 153.

Chief Baron Pengelly and Mr. Justice Denton. "I was not present at these Assizes," says Mr. Welles, "not being well."

Sir Thomas Pengelly was appointed Chief Baron of the Exchequer, October 29th, 1726.

At the Quarter Sessions, held October 8th, Mr. Thomas Cook, Chairman, "upon a motion made in behalf of Mr. Hemming the jaylor, against the keeper of a Bridewell, I think that by Bristol, for detaining prisoners that ought to have been brought to his Gaol, and depriving him of his fees: I had a long dispute with our Chairman, who presently began to be warm for the jaylor without understanding the case. It seems he knew nothing (nor, indeed, any Justice on the Bench but myself) of the Act (6th, I think) of King George the First, to empower Justices for small crimes to commit either to Gaol or Bridewell.* 'Twas a good while before I could make him believe there was any such law, or that the smallest felons could be detained anywhere but in Gaol. At last I found the Act and read it to him, and made him sensible of his mistake, and calling for the witnesses it appeared the men were committed to Bridewell; so there was an end of the matter.

At the Quarter Sessions held January 14th, "I was forced," says Mr. Welles, "to be Chairman myself this session, there being only the Archdeacon and Mr. Guise besides in court, and both declining it: and Mr. Thomas Cook, who came in before the charge was given, likewise refusing it." Upon this occasion there were five indictments against persons for keeping bawdy-houses in the parish of St. Philip and Jacob, by Bristol; which, we learn, "were too plainly proved." These delinquents were condemned to stand in the pillory and to various terms of imprisonment. John Watkins also, being found guilty of "end-gathering,"† was sentenced to be whipt three market days and to be committed

* Reference has been made to this Act in Mr. Welles's note of the Assizes held March 9th, 1722.

† In what this offence consisted we are unable to offer any explanation.

to Bridewell for three months. Another delinquent, for stealing a brass kettle, value 2s. 6d., was ordered to be transported for seven years, "having been severely burnt in the hand an assize or two before."

Mr. Justice Fortescue Aland seems to have had the whole business of this Assize, held March 29th, 1729, upon his hands, his brother judge (Probyn) not appearing at Gloucester. We have no note of the business of this Assize, except of the fact that five were condemned and two executed.

At the Quarter Sessions held July 15th, Mr. Hyet, Chairman, a considerable portion of the time of the Court was occupied in the release of Insolvent Debtors.

Mr. Justice Price appears to have discharged single-handed the business of the Assize held July 19th, Mr. Justice Probyn, the other Judge, "not sitting." This is the third occasion within sixteen months that this learned Judge, (who appears to have been made Justice of the King's Bench, November 7th, 1726, and Lord Chief Baron of the Exchequer in 1740,) being appointed to the Oxford Circuit, suffered his duties at the Gloucester Assizes to devolve upon the unassisted shoulders of his colleague. He appears also to have been one of the Judges of the Circuit at the Summer Assizes of 1732, 1735, 1738, and the Spring Circuit of 1739; and upon none of these occasions does he appear to have taken any part in the business of the Assizes. We infer from this that he was either a native of or resident in Gloucestershire, the law formerly being "that no one shall be Justice of Assize in the county where born or he doth inhabit, under a penalty of £100." It may also be observed, that this learned judge when at the bar "rode" the Oxford Circuit; his name, moreover, frequently occurs as one of the counsel in attendance at the Gloucester Sessions.

The Judges of the Assizes, held March 4th, were Mr. Justice Denton and Mr. Justice Reynolds. The latter, we are told, "gave a very good charge like an honest English gentleman, and like a learned Judge." Three malefactors

appear to have been condemned for sheep-stealing and one for burglary; they were all, however, reprieved.

At the Quarter Sessions held April 7th, 1730, "'twas allowed at this Session that an examination, taken before a Justice of the Peace, should be read as evidence when the examinant was dead."

Mr. Justice Price and Mr. Baron Cummin were Judges of the Assizes held July 11th, Judge Price sitting at the "Crown End." "Four were condemned for several riots in Bristol, breaking into houses, and burning looms. Two of them were reprieved; Bridgood was executed." The Quarter Sessions closing with these Assizes were adjourned to the 16th.

The Spring Assizes were held on March 6th following, the Judges being Mr. Justice Fortescue and Mr. Justice Lee. "This Assize," we learn, "began the ballotting for Juries. Several were excused that had not had the small-pox, it being very bad in Gloucester, and upon other accounts, and some fined 40s. The Act running not less than 40s. nor more than 5 li. Two persons were condemned: Solomon Gear, for house-breaking, who refused to plead, till, terrified by the sheriff bringing in a carpenter to measure his body to make an engine to press him, he relented. He was reprieved. Wm. Croome, for robbing on the highway, was executed." The above is the only reference to the *peine forte et dure* we meet with in Mr. Welles's Journal. The "ballotting for Juries," which came into operation at these Assizes for the first time, was introduced by 3 Geo. II. c. 25, entitled "An Act for the better Regulation of Juries."

The following incident, which occurred at the Quarter Sessions held April 27th, of 1731, it is to be feared must have proved entirely subversive of the gravity and decorum which should characterise all proceedings in a Court of Justice. "A whore of Cowley swore a Bastard child upon a man of Gloucester (I think). She had sworn it upon another before. But 'twas proved she had been very familiar with a Black;

and the child being brought into Court appeared to be a perfect Mulatto. So the man was discharged."

At the Quarter Sessions held July 13th, Mr. Hyet, Chairman, "the Baker that serv'd the Gaol was discharged for making sorry and light bread. I thought there was a design in it; so proposed to choose his successor by ballotting," (once started, the ballot seems to have achieved popularity in a very short time,) "which was universally approved of; and I put the names of fourteen into my hat and the Chairman drew one."

The Judges of the Assizes held July 31st, were Mr. Baron Carter and Mr. Justice Fortescue Aland. "Judge Fortescue sate on the Crown side; and according to his custom gave an excellent charge, especially upon the point of religion and morality. Clare, a collar-maker, to whom had recently fallen a considerable property, was tryed for the murder of one Wain by a blow with the butt-end of a whip at Frog Mill, as they were coming home on St. James' day from Cheltenham Fair, and found guilty of Manslaughter."

The following note of the Quarter Sessions held January 11th, seems to indicate that amongst many forgotten usages of that day it was customary for the High Sheriff to feast the magistrates assembled for the purpose of holding the Sessions. "We had this Sessions," says Mr. Welles, "no dinner provided, the new Sheriff not being sworn, and the old expecting, or pretending to expect, every minute to be superseded." The language employed upon this occasion justifies us in the supposition that the writer had his reasons for suspecting the high functionary referred to of churlishness and a lack of hospitality but little in accordance with the spirit of the age. Parson Welles, like Parson Adams, may have had a keen relish for ale and pudding; and of the prandial and post-prandial performances of the country gentlemen of that period much may be learned by a perusal of "Tom Jones" and "Roderick Random."

The following note of a case tried at the Assizes held March 5th, the Judges being Chief Baron Reynolds and Mr. Justice Fortescue Aland, is observable as demonstrating the active

habits of our ancestors, who, if they sacrificed somewhat liberally to Bacchus, failed not to render also due homage to the rising sun. "The great cause between Mrs. Ridler and her brother, being an issue out of Chancery whether Mr. Thomas Ridler, her husband, was a lunatick at the time of executing the deed whereby he conveyed away his Estate from his wife and children, was tryed before my Lord Chief Baron; when after a hearing which lasted from about six in the morning till one at night, about two the jury found for the Plaintiff; that is, Mr. Ridler a lunatick."

At the Quarter Sessions held April 18th, 1732, Mr. Cook, Chairman, "We had," says Mr. Welles, "two cases this Sessions strongly debated upon Appeals. One was upon a removal from Northleach (I think) to Dedington in Oxfordshire. The Appellants would show that he had a settlement at Eastington; which stood thus,—He was hired there for a year. And six weeks before the year was up his master put him away (paying him such wages as he thought fit) and told him, (as he swore,) Sir John Dutton ordered him to put him away, that he might not gain a settlement. Sir John Dutton, who was upon the Bench, said the master came to him, and complained he had a Servant who lay out of his business, and he could not tell what to do with him, and he bid him then put him away, or if he would not go away bring him before him. Sir John Guise was very warm in this case that 'twas as plain a fraud as ever was; that his master expressly told him 'twas to avoid a settlement, that he was not willing (as he swore) to go away, and had not layn out of his master's business, and therefore ought to be a settlement. I could not by any means come into his opinion, and we had a great deal of discourse upon it both in Court, and next day out of Court. He was put away six weeks before his time; he had all that time to apply to a Justice of the Peace; he took what wages his master would give him; it must needs be in the beginning or heighth of harvest, when no master ever would put away a tolerable servant: therefore it must be a parting by consent; the man either not daring to

appear before a Justice to have a hearing by reason of some fault, or else thinking he could not make himself amends by the profit of the harvest. Sir John insisted upon the man's oath; I upon the facts, which I thought much stronger than the oath. As to the man's remedy by a Justice, Sir John said the man did not know the law. I said, '*ignorantia legis*,' he knew, was no Plea, nor could it be true, for he was a pretty elderly man, and no boy of sixteen; but knows he has an easie remedy by a Justice's warrant iff his master any way wrong'd him. Nor did the man himself plead ignorance. Mr. Cook was as positive against the settlement as Sir John for it. 'Twas determined against it. I think there was but one more of Sir John's mind."

The other litigants appear to have been the parishes of Colesbourne and South Cerney. "A man was hired at a mop Wednesday or Thursday, Michaelmas day being the Friday before; and expressly hired but to the Michaelmas following, which was six, or at least five days, short of a year. Mr. Cooke would have it a settlement because it was at a mop, and the country meet for that purpose. Sir John Guise was as warm against it. 'Twas argued a great while Tuesday in the evening, and the Bench divided four and four; Sir John Guise, Mr. Stephens, I and another, against the settlement; Mr. Cook, Mr. Hyet and two more, for it. 'Twas ordered to be heard again on the morrow, when, perhaps, there might be more Justices, as there were. And then 'twas carried against the settlement, seven against five. But they would have it drawn up for the opinion of the King's Bench. I wonder'd to hear this case so long and so strongly insisted upon, when the opinion of our Court has been so constant and clear in this case ever since I sate in it, to keep up strictly to the letter of the Act for a year's hiring and a year's service. And I was pretty sure I had cases in my book that fully answered this." Here follow references to three decisions of the Bench at Quarter Sessions, occurring respectively in the years 1715, 1723 and 1726, all of which the writer had duly recorded.

At the ensuing Quarter Sessions, held July 11th, it was reported that the opinion of the Judges was against the settlement: a fact which Mr. Welles mentions with much apparent satisfaction.

Again we are compelled, by lack of space rather than of material, to pause. We trust, however, to be enabled to finish our notice of these interesting memorials *temporis acti* in our next Number.

ART. IV.—CAUSES CÉLÈBRES.

(No. III.)*—A TRIAL FOR CHILD POISONING IN GERMANY.

IN the village of Schwebda, about five o'clock in the afternoon of the 2nd October, 1851, an illegitimate child of Christina Müller, named Frederic William, who was then nearly four years old, came running, in high spirits, to his grandmother, (who was engaged in work at home,) and crying out, "Grandmother, I have been at father's, and he gave me something." "What was it, child—cake or sugar?" "No." "Then it was something nice out of a glass, I daresay," guessed the old woman. "No," replied the little lad, "but out of a paper, and it tasted sweet." And then he trotted off to his grandfather, to inform him too of the happy event. A like conversation was repeated between this second pair. The child then betook himself to the street, and played about with his companions. Very shortly, however, he hurried back to his grandmother, complaining of pains in his stomach. She was too busy to attend to him, and he therefore went on with his complaint to his grandfather, who, as soon as he heard of it, seems to have entertained a suspicion that the child's father, one William Bütemeister, had been guilty of foul play with

* See 9 *L. M. & R.* p. 290 (for August, 1860).

the child. The grandfather, therefore, asked him a few questions. "Were you in the room with your father?" "Yes." "Why did you go up there?" "Father called me." "Were you alone with him?" "Yes." "But why did you not bring me some of this nice stuff?" "Because father told me to eat it all up at once."

These replies strengthened the old man's suspicions, and he gave the poor child milk, having heard that it was an excellent thing for people when poisoned. But the pain became worse, violent vomiting commenced, all colour left his cheeks, the breathing became hard and the voice weak, an insatiable thirst set in, but the stomach would not retain the milk given to quench it. They ran to fetch the mother, whose first questions to the child were, "Did your father give you anything?—and were you alone with him?" She then hurried off to the father's house, with the object either of learning from his admission what remedy to apply to save the child's life, or happily of being comforted by the assurance that the story she had heard was false. She could not find him, and so hastened again to the child, who was becoming quickly cold. She endeavoured to restore warmth to it, but in vain—it died. The whole of the scene we have here narrated occupied two hours.

The Müller family saw that the child was dead and felt sure it had been poisoned. The grandfather called to the neighbours, who soon assembled before his door. "Would you know," cried he, "what has happened to the child? Why, he has been poisoned by his own father." This was a public accusation which could not fail of exciting subsequent attention.

Formal proceedings were taken by the burghermeister to notify the occurrence to the Authorities of Justice at Eschwege, by whom the official medical men were instructed to examine the corpse. Their report was to the effect that the expression of the countenance was placid, almost as if in the repose of sleep; the eyes were half open, the eyeballs clouded and sunken, the teeth firmly clenched, the belly was distended and

was of a blue-tinted white, the fingers were crooked, the nails intensely blue, whilst from the mouth flowed a whitish fluid, on which when the flies alighted to feed they immediately fell down dead.

Further *post-mortem* examination disclosed that the great as well as the small intestines were of a red rose colour. The internal mucous membrane was injected, and the blood-vessels and extravasated blood could be traced. The liver and spleen were gorged with blood, and of a red colour. The stomach was nearly of the hue of red brick, and on its hinder wall was a dark crimson spot, of about an inch and a half square. It contained a whitish fluid with something of the smell of milk. The mucous membrane of the stomach was very inflamed, and showed innumerable points of extravasated blood. The brain was full of blood. The stomach and its contents were submitted to chemical examination, and at the least eight grains of arsenic were found there. The medical authorities certified that *Frederic William Müller had died poisoned by arsenic.*

The public officer had thought it his duty on receiving the information of the circumstances attending the death of the child, to cause an examination to be made of Bütemeister's house. In a drawer of his desk, which he usually had under lock, a small blue paper was found, upon which "*arsenic*" was written, and in which was contained a white powder. When asked if the powder was arsenic, Bütemeister declared he did not know even that he had the packet in his possession; though, as it was remarked, it was lying among articles of daily use,

A gendarme was sent to Schwebda on the 3rd October, who thought it his duty to take the suspected man into custody.

In company with the burghermeister, therefore, he proceeded to Bütemeister's dwelling. They found him in his *comptoir* sitting and writing. He neither turned nor replied to their salutation till he heard the clinking of the sabre of the gendarme, who came close to him. The gendarme requested his attendance at the burghermeister's. Without asking why, he simply expressed his wish first to finish the account he was then making

out; after which, he coolly closed the *comptoir*, and went to the burghermeister's, where he sat down and spent nearly an hour without exchanging a word with his companions upon the object of his having been thus summoned, the burghermeister having sagaciously, and according to the habit of the country, sent in two inhabitants of the village to watch him. On the gendarme offering him some dinner, he replied that he had no appetite. Presently the Kammer-herr entered the room, and inquired if he knew why he was in custody; adding that it was because he was suspected of having poisoned the child of Christina Müller. "Oh, that is what I supposed," he simply returned.

On the first examination the prisoner made the following statement:—He said that it was in the year 1846 that he had formed a sexual relationship with Christina Müller, the consequence of which was the birth of William Müller, in December, 1847. He had persuaded her not to announce him as the father of her child; but he had nevertheless to contribute to its support, and had thus spent at least 200 dollars; that he was very fond of the child, though he was cautious not to appear so; that he believed his wife was not aware of his illicit connexion; that the first time he heard the news of the child's death was 2nd October, at supper, when his wife mentioned the fact that at ten o'clock on the same evening Christina had come to her, told her of the child's death, and asked for money for the funeral.

He further stated that he had seen the little child only once, about two o'clock, in the road; that he had gone about this time out of the field into the house to get some tobacco; that he had stayed scarcely a quarter of an hour at home, and then returning to the field, there remained till six o'clock; and that he would take "his most solemn oath he was entirely innocent of the murder of the child."

The only witness who had raised suspicion against Bütmeister, the little William Müller, was now silent for ever. His statement could only now be presented through hearsay. Had he indeed been alive, his evidence would have been that

of a young child. On the other hand, it was deemed that in no particular was the statement contradicted, but in all confirmed.

The child had related to its grandparents that he had been in the Castle-court, at his father's; and it was established from other sources, that at the alleged time he had been sent to the spring called the "Thick William," and had there been seen at the critical period. At this stage of the inquiry it was thought that further collateral inquiry into the character of the accused was justifiable. His accounts were re-audited, and an error of 500 dollars was detected, for which he was not able to account. Then again it appeared, (though he at first strictly denied it,) that not being able to get possession of the person of Christina by other means, he had promised to marry her so soon as he could obtain a divorce from his wife. A ring of betrothal marked Ch. M. and W. B., Oct. 27, 1846, being produced, he was forced to admit that he might have promised to marry the woman. Further, this "respectable" man, whom all the world, as the magistrates had been informed, held in such high esteem, was somewhat of a libertine in his life: he had seduced a servant girl, who had died in childbed, and he had for a long time maintained intercourse with another servant. Moreover, he had a child by a married woman, who was living apart from her husband.

It is to be presumed, we may here interpose, that the evidence of these statements was properly sifted, and that the scandal reflecting on his good name and his former supposed high reputation were not based equally on small town talk. The dangerous and untrustworthy nature of what is called "public report" is well illustrated in this instance. Either Bütemeister actually had a good name without deserving it, or the authorities, in the first instance, *i. e.*, until appearances connected with the poisoning began to turn against him, were not able to ascertain what had been the true opinion entertained of the man. It may be, however, though the general notion that the malice of the world too often defames unjustly,

is true, yet that Bütmeister's case is one example of a numerous class of great rogues who pass for honourable men.

We come now to another piece of evidence of more direct importance contributed by Christina. She deposed that about eight weeks after the birth of their infant, Bütmeister had visited her, when she was alone with the baby, and had sent her down-stairs to bolt the door, that they might not be interrupted; she went, but on a sudden heard her baby screaming, though she had left it sleeping tranquilly in its cradle. Hurrying back, she observed the baby's tongue sticking out, and upon it and the lips was "something white and dry," like powdered white sugar, which she wiped away as well as she could. Bütmeister then asked her, "What have you been giving to the child?" Afterwards, however, he made a contradictory statement, viz., that *he* had given something to the child because it brought up its milk. She replied to him that it looked like "something not good for it," and after some time the child had strong vomiting, upon which she upbraided him, saying, "Now you see you *did* give him something wrong." But Bütmeister begged her to say nothing about it. She however told her mother the same evening, and since then took care that the child should never "fall into his clutches again." She also alleged that the next morning there were blisters and a breaking out on her baby's lips. The medical authorities expressed an opinion upon this statement, that the white substance employed was arsenic. Christina also stated that the prisoner had urged her to put the child out of the way. All this he positively denied.

The scientific evidence had established that the substance in the blue packet was arsenic, and of the same description as that found in the body of the deceased.

The prosecution next directed their attention to discover whether Bütmeister had purchased any arsenic himself; or, as we should rather say, (inasmuch as the tribunals in Germany hold the accused guilty till he prove himself innocent,) they endeavoured to establish that he had himself procured the

poison, but in vain. Their appeal to him to explain, resulted in his inventing a falsehood, for he accounted for it by saying a veterinary surgeon had left it probably with other things which he was in the habit of leaving in his *comptoir*. This was, however, most distinctly shown to be impossible, but did not amount to more than convicting the prisoner of offering a false explanation.

There was, however, another phase which the trial now assumed, which had an important influence upon the minds of the judges. One result to which they had come was, that the deceased had taken the poison between four and five o'clock, whilst away from his grandparents, at the Castle-court. It was therefore important for the prisoner to prove an *alibi*, and to this he forthwith addressed himself; should he succeed in this attempt he would be shown to be innocent, but if he ultimately failed, it followed from the very nature of the defence that he would materially augment the weight of evidence against him.

The so-called Castle-court where the prisoner lived was an ancient building on one side of the village street, and so arranged with its garden and grounds, and so provided for ingress and egress with gates and thoroughfare, that the mode of access to it was within easily defined limits, and the passages open to common observation. Bütemeister protested that after he had fetched his tobacco at two o'clock he had returned to the fields, and he named the peasants whom he had been overlooking at different periods of time between two and six. He was very successful in showing where he was during many of the hours of the afternoon in question—but the critical hour, after all, was not satisfactorily accounted for. Pfeil, the tailor, and two others, deposed that they saw Bütemeister, on the particular day, once about half-past three o'clock, come out of the old castle garden towards the meadows—there he remained half an hour or so, and then returned to the castle garden. This would bring him to four o'clock. At five o'clock he was seen again on the same road, once more coming to the meadows.

During the hour between five and six o'clock his appearance at different places was satisfactorily spoken to. Thus the hour between four and five, an interval to which the fact pointed with the greatest suspicion, as being the time when the poison was administered, the prisoner did not account for, whilst for the rest of the time he did. In other words, the damaging consequences ensued of *an alibi failing*.

When the prisoner saw this last attempt had failed, he had recourse to another expedient, namely, to throw the suspicion on another. To this end he narrated how once on the 17th September, 1850, he had been at Eschwege, and towards mid-day returned to Schwebda, and then heard that the child on coming home had said his father had given him beer to drink, and soon after fell very ill, somewhat as on the present occasion—and he thought with the others that the child had then been poisoned. Now he argued, as he had not been to Schwebda that morning, it was not he who could have given the child beer, and therefore it was some one else who then, and probably now, had poisoned the child. Christina was questioned about the matter, and she said that such an occurrence had taken place, but not on the 17th September, as he represented, nor was it in the morning, but one afternoon, and it was her belief then, as now, that it *was* the prisoner who had then made an abortive attack on his child's life.

The public prosecutor (*instructions richter*) could have now no doubt as to who was properly the object of suspicion. He concluded it was the father of the poor poisoned child, William Bütemeister, head steward of the royal manor in that district.

Who was this Bütemeister? According to the system of criminal law in Germany, the antecedents of the accused are always investigated as forming part of the evidence connected with the charge. We can therefore inform the reader somewhat of his history and character.

Bütemeister was born in 1804, upon the Hundsrück estate, (in Hanover,) of which his father was the tenant. In his twelfth year he was placed with a priest to be educated,

and after his confirmation he entered the Gymnasium at Holzminden. Having completed his course of education, he undertook the management of several estates, till in the year 1830, when the death of his father obliged him to return home to protect the interests of his mother.

The pecuniary affairs of the family appear to have turned out unfavourably, and indeed Bütemeister found himself without property. In the mean time he had married, and one son had been born to him. Not being able to remain longer upon the old estate, nor having the means of farming another, he sent his wife and children home, whilst he himself, in the year 1836, undertook the office of steward and manager under the Kammer-herr at Schwebda, with a salary first of 120, and afterwards of 140 dollars [*per quarter?*], and his wife entered into service. Bütemeister filled his post till 1851, and by his industry and skill gained the entire confidence of his employer, and he was generally respected in his neighbourhood. He was physically very strong; sober, staid, and reserved in habit. Such was the man who was now suspected of being an assassin and poisoner.

On the 26th January, 1852, the magistrate had an audience with Bütemeister, in which he communicated to him that the attempt at a defence which he had made was useless, and he then called on him to confess; but the prisoner only protested his innocence.

The next morning the gaoler informed the magistrate that the prisoner had made an attempt at suicide. It occurred in this way:—when the warder was taking him his breakfast into the cell, the prisoner sprang on him, thrust him into the cell, and shutting the door on him, fled up the stairs. Here the son and wife of the warder endeavoured to stop him, but being a man of huge strength, he struck them back, opened the inner door, and hurried through the prison gate, in order to throw himself into the river. The warder's son pursued him, and called on a passer-by to secure him. He could easily have escaped the danger, but at this moment a fit of cowardice

seized him, and instead of carrying out his intention, he made no resistance, and was brought back quietly into confinement. The magistrate charged him upon this that the attempt arose from a consciousness of guilt; but the prisoner retorted with equal force that it was from a dread lest he should be wrongly convicted.

Thus ended the preliminary investigation, and the Court adjudged him to undergo his trial before the proper tribunal, on the charge of murder.

The trial was commenced on 19th July, 1852—for these things in Germany are conducted leisurely enough—and it lasted six days. When the prisoner appeared in court, so great was the alteration in his appearance that he could hardly be recognised. His bearing was altogether changed, he was bent, his hair was grey, his face pallid and full of anxiety. He still declared himself, however, innocent, and the trial commenced.

The medical witnesses were examined as to whether arsenic was sweet or bitter, about which there is some doubt, for there is a difficulty in inducing scientific witnesses to make the experiment, and the circumstances under which others consume it, voluntarily or involuntarily, are not favourable to accurate record on the subject. Evidence as to when the symptoms of poisoning would show themselves was given, and the possibility of the child getting at rat poison seems to have been satisfactorily negatived.

The state prosecutor insisted in his address on all the points above detailed, and urged that as regards motive, it was clear that the bastard child was an expense to the prisoner, and would have endangered his character and comfort if it came to the ears of his wife and his employers.

The next day, among other witnesses, Christina Müller was called, who gave evidence as we have already mentioned. The president proceeded to examine her further.

Q. "Have you spoken with the accused since the death of your child?"—A. "Yes; I went to him on the same evening on which my child died, to ask for money."

Q. "Did you then believe that Bütemeister had poisoned your child?"—A. "I was certain he had."

Q. "Did you speak to him on the subject?"—A. "No. I was afraid he would make a disturbance, and so come to punishment."

Q. "How did he conduct himself to you on this evening?"—A. "He took me on his lap, tried to comfort me, and promised still to support me."

Q. "You said nothing then about the cause of its death?"
A. "No."—The witness further deposed that she had made a misstatement before; that the prisoner had the next morning come to her window and asked if the child were really dead. She repeated her evidence of he having recommended her to destroy the child, and that the child always called him "father." The prisoner gave an account of the transaction similar to that he had before offered. The President of the Court submitted him as usual to examination.

Q. "When Christina came to talk to you of money for the funeral did nothing else pass between you?"—A. "Yes, she wept and mourned over the child's death, and I comforted her by promises of further aid and support."

Q. "Did nothing pass about the cause of the child's death?"—A. "No."

Q. "But you had previously heard from your wife of the supposed cause of the child's death."—A. "That is so; but I was unwilling to increase Christina's sorrow by further questions."

Q. "You knew what the child said about your giving it something out of a paper?"—A. "Yes; he may have said something of the kind; but he was a child, and children cannot be witnesses."

Q. "What did you think when the gendarme and the burghermeister summoned you to appear?"—A. "I thought nothing at all."

Q. "You have given another answer before?"—A. "Yes; it now occurs to me that I thought it was about a blow I had given one Appel, the shepherd."

Q. "Have you ever heard of a man being so taken into custody on such grounds?"—A. "No, but it might very well so happen."

Q. "Your conscience must have suggested other grounds for your apprehension; besides, when told it was for poisoning the child, you replied, 'I supposed so'?"—A. "I don't recollect exactly such a conversation."

The advocate for the prisoner urged the obvious arguments in his favour, that the case was obscure, the possibility of the child getting poison elsewhere, the danger of taking the talk of a child in evidence, the untrustworthy character and contradictory statements of Christina, and so on.

The President summed up, and left the matter to the decision of the tribunal. They found by their *verdict* that *the child had been wilfully poisoned* by the prisoner. The Court sentenced him to be beheaded with the sword; when in a tranquil and resolute voice he exclaimed, "My soul trusteth in God."

Three days after the conclusion of the trial, Bütmeister informed the President of the Court he had certain requests to prefer. He then requested to see his wife, and another relation. To them he declared he would not appeal, but would sue for a pardon. The President observed that without sincere repentance for his misdeeds he could never obtain pardon, and that his repentance must be accompanied with confession. [Whether he referred to a pardon by the crown or by Heaven is obscure.] For an hour Bütmeister struggled with himself whether he would confess or not. He was allowed to see his relations in the presence of an officer of justice. He then declared his entire innocence, but resolved to admit his guilt to obtain pardon, though such an admission would be false. Being assured that such a confession would be worthless, he confessed unconditionally. He said that when in the Castle-court he had heard the child cry out to one Collman; at that moment the devil seized possession of him, and he immediately

gave the child the poison and turned away. At the same time he denied he had ever attempted the child's life before, or had endeavoured to induce Christina to destroy him. The officer replied, it was an unlikely thing that he should have given the child poison in the open court. He then proceeded to offer several other improbable statements, which the officer likewise controverted. He finally confessed that he had promised marriage to Christina, had got possession of her person, and when the child was born, had been called on heavily by the Müller family for support; that he had been obliged to take the property of his master to meet various demands, and thus embarrassed had been driven to resolve the death of the child. He had met in a public-house in Hesse a man who sold medicines and poisons, and he had bought some poison then without any intention of using it against human life. Indeed, that the child had not then been born; and it was months after its birth that he thought of using it against the child.

He afterwards admitted that he had given it arsenic when in the cradle, as Christina had deposed, but this having then failed, he waited for another opportunity. This occurred when the child came to the court; and he then gave it some on some bread. He declared the child had no glass with him, and he had never given it poisoned beer as deposed. "Oh that I could now weep," he added; "I am so happy that I have been able to confess—And if I could only escape that dreadful sword." The attendants were convinced that there was no true repentance in this confession, but that it was made with a view to a hoped-for pardon. He showed no signs of real emotion when narrating the facts, and stating his motives, and the authorities reported that he evinced a cold-blooded, hard-hearted, false, and cruel character, which rendered him quite unworthy of pardon.

On the 19th October he was informed that no pardon could be extended to him, and that in three days he would be executed. "I have deserved it," he exclaimed.

He was bidden to prepare for death; was removed to a better

cell, and had good fare provided. The following morning the judge found him with his spiritual adviser, who was giving his earnest exhortation to turn his mind from earthly to heavenly things. But Bütemeister immediately recurred to the trial, and complained of the jury committing him on such light testimony, and giving weight to the child's statement. Again, on the next day he protested he had not poisoned the child out of the packet, but out of a glass, and that he had never put the packet in his *comptoir*; when warned against the folly and useless wickedness of lying, he retracted his falsehoods and was silent.

On 22nd October, more than twelve months after the murder, at seven o'clock, he was again bidden to prepare for death. He fell to prayer, then asked for a glass of wine, and proceeded to dress himself in the "poor sinner garment," a long white shirt, with black skirt, a white cap with black bands. He bade the officers farewell, mounted the cart which was to take him to his place of destruction, and in an agony of trembling proceeded on his awful way, holding the crucifix in hand, and praying earnestly. Without help he mounted the scaffold, and looking round on the multitude, *chiefly women*, exclaimed, "Here then I must finish." Then rising suddenly, seated himself on the chair, "Only be quick;— Oh, Jesus, Jesus—" and as he thus cried the sword severed his head from his body. The frightful sight seemed to produce little effect on the spectators, from whom the careless jest and coarse jeer was heard much as usual.

Among those present at his execution was Christina Müller.

ART. V.—CHARITABLE TRUSTS.

Report of the Committee of the Society for Promoting the Amendment of the Law, appointed to consider the Subject of Charitable Trusts. June, 1861.

THE laws affecting property dedicated to Charitable Trusts have been recently the subject of two Inquiries before Select Committees of the House of Commons—one in 1844, and the other in 1851.

In the Report of the 24th July, 1844, it is stated that, from the reign of Queen Elizabeth to the accession of the House of Hanover, the general tenor of the public mind, as evidenced by the Legislature, the judicature, various royal proclamations, and the acts of numerous private persons, was strongly in favour of alienation of property, real as well as personal, to pious and charitable uses; and the Committee observe that they have failed to arrive at any certain knowledge of the true grounds of the Act of 9 Geo. II. c. 36, the statute which now chiefly affects such gifts. The Committee did not feel authorized, by the terms of reference, to report in favour of any specific alterations of the laws of mortmain: they however concluded by expressing an opinion that the operation of the law was most unsatisfactory—led to doubt, expense, uncertainty and litigation—and frequently defeated good and pious purposes, which the present aspect of the country would induce all men to wish fulfilled; whilst, from the existing facilities for evasion, the law could not be regarded as serving the main purpose for which it was supposed to be maintained, by securing the heir from the unexpected alienation of property to which he might reasonably have hoped to succeed.

The Select Committee on the Laws of Mortmain, appointed

in 1851, by their Report of the 17th July in that year, merely laid the evidence they had received before the House.

Much diversity of opinion seems to prevail as to the governing intention of the statute 9 Geo. II. By some, it has been regarded as designed for the general discouragement of gifts of any property whatever upon charitable trusts; and this opinion would seem to have been the cause of the large construction given to it by Courts of Equity. In a very recent judgment of the House of Lords, on a case in which an ingenious attempt had been made to evade the operation of the statute, *Jeffries v. Alexander*, Lord St. Leonards, speaking of the statute, is reported to have said:—"It appears to me to be one of the wisest Acts that ever was passed. It does not take from any man the power of disposing of any portion of his property; but it does remove from him that liability to abuse, which many men from mere personal vanity would employ, to the prejudice of those who would be entitled to succeed them." And Lord Kingsdown observed, that "it was for the protection alike of the individual and the public."

It must therefore be presumed that there are some objects attempted to be effected, and to a certain extent accomplished, by the statute, which meet with a large share of the public approbation; and, on the other hand, from the evidence of attempted as well as of successful evasions of the Act, it appears to impose obstacles to the disposition of property for public objects of undoubted utility, where the gift would not be open to any conceivable objection. In the Report of the Select Committee of 1844, it is observed that if the alleged object of the statute be a proper one, it appeared to the Committee that land left to charities with a direction to be sold, and all virtually personal property, do not fairly come within the intent of the statute; and this is substantially repeated in the late Report of the Education Commissioners; (p. 514;) who, limiting their recommendation to the proposal to facilitate grants of land as sites for schools, add, "It seems reasonable however, if the State desires to encourage these foundations, that the

decisions which extend the provisions of devises in mortmain to mortgage money, and to the price of lands ordered by the will to be sold, should be repealed. The same observation may be made with regard to the rule of the Courts of Equity that as to charitable legacies, the assets shall not be marshalled."

The statute 9 Geo. II. c. 36, certainly proposes to deal only with land. It is entitled "An Act to restrain the disposition of lands whereby the same become inalienable." The preamble states that alienations in mortmain are restrained by divers wholesome laws, as against the common utility; and the special occasion of the Statute is represented as being the late great increase of the public mischief, by "many large and improvident alienations or dispositions made by languishing or dying persons to charitable uses, to take place after their death, to the disherison of their lawful heirs."

The Statute, therefore,

First, affirms the more ancient laws which prohibit or restrain the alienation of land in mortmain ;

Secondly, it declares such laws to be wholesome, and such alienations to be mischievous to the public ;

Thirdly, it prevents the disposition of lands for charitable uses except under certain conditions : but where such conditions as to time and form shall be complied with, the pre-existing powers of alienation are undisturbed.

In the first two parts of the foregoing divisions of the declaratory preamble, there is nothing inconsistent with sound policy. The surface of the country is necessarily limited in quantity ; and although the facility of sales, exchanges, and reinvestments by administrative means, greatly moderate the inconveniences of perpetual uses, yet dispositions which take land permanently out of the ordinary conditions of proprietorship are to be defended only by showing that the particular dedication is of such necessity or of so much value to the public good, that an exception should be made in its favour. This, of course, may frequently be the case ; churches, chapels,

schools, and hospitals, are examples in which the appropriation of proper sites is necessary for the purposes of general utility and permanence.

There does not seem to be any reason for supposing that the statute 9 Geo. II. was intended to discourage gifts to public and charitable uses generally. Such a purpose can scarcely be imagined, whilst vast sums are required and are annually raised, both by local and general taxation, for purposes connected with the public welfare, convenience, and safety. The objects of ancient bounty comprised every institution felt to be necessary or beneficial, or capable of relieving the public burdens. They included establishments for instruction, spiritual and secular, endowments to make and maintain causeways, roads, and bridges; for assisting the people in the charge of fifteenths and other taxes, for providing arms for the general defence, hospitals for the cure of disease, and for contributing to the support of the poor in every form; and there seems no reason why, if individuals are willing to dispose of their estates to such purposes, any of these charges should not be provided by endowments, and the public to that extent relieved. Very few, perhaps, would deem it wise or desirable to refuse the voluntary aid of the wealthy, whilst so much assistance is still demanded for education, and for raising amongst the poorer classes their standard of well-being. Most persons will agree that it will be time enough at least to arrest such gifts, when every child in the kingdom shall have access to a school, and every family shall be lodged in a manner to preserve health and decency. Your Committee would even submit that the fund derived from charitable gifts, and applicable to the public benefit, cannot be too great as long as any necessity remains for taxation. It would be only at a period when the income of the State derived from gratuitous sources should be sufficient to provide for all the exigencies of the community, and there should no longer be any need of compulsory collection, that it could be said that society might prudently reject the voluntary gifts or bequests of its members. Indeed the notion that gifts

to public or charitable uses ought to be discouraged, originated, there is no doubt, in the frequently narrow and absurd objects of such bequests, their failure of any useful result, and the mischievous effects which they often produce. The true amelioration of the law would seem to be that which would encourage the largest liberality, but on the condition that its results shall be devoted to the widest objects of national utility.

Assuming the main and substantial principle of the Act of Geo. II., as it relates to land, to be adhered to and consistently followed, the restraints on the alienation of land to uses in perpetuity should be rendered more effectual. Purchases and conveyances of land, by way of endowment, can at present be made, by deed, to any extent. Investments in real property are constantly made by trustees of charities, and are even frequently sanctioned by special Acts of Parliament; and there is little reason to doubt that the quantity of land held on such trusts has greatly increased, and is still increasing.

Instead of the mere restriction on devises of land, or on conveyances except under particular formalities, a more effectual provision would be, a law enacting that—

A. After the no land (not theretofore held upon charitable uses) shall be held as a permanent endowment for the benefit of any charity or for any charitable use, except such portion as shall be deemed by the Committee of the Privy Council on Charities to be necessary for the site and purposes of the particular institution,—as the school-house, hospital, or other edifice and its proper appurtenances; and all other land shall be sold within three years after the same shall become vested in the trustees or administrators of the charity (except the said committee shall, for any special reasons, enlarge the time for such sale for a further period, and which further period shall not exceed four years); and the purchase money shall be invested in Government or other sufficient security, with the approbation of the Committee.

Such a provision will remove the occasion of most of the attempts of testators to evade the law as it at present stands; and will render it unnecessary to retain in the statute-book the restriction against devises or conveyances of real estate, whether

to corporations or to individual trustees. It would prepare the way therefore for such a provision as the following :—

B. Any corporation, whether aggregate or sole, to which lands shall be conveyed or devised on any charitable trusts shall be empowered to take and hold the same, without any licence in mortmain, for such period as shall elapse before the same shall be sold, as aforesaid; and to convey such lands to the purchaser or purchasers thereof.

It may be said, that the repeal of the restriction on devises would leave the heirs of “languishing and dying persons” exposed to the dangers to which the preamble of the statute refers. Upon this point the Select Committee of 1844 observe, that “There seems to be great truth in the opinion expressed by a witness, that if it was thought necessary to secure the heir from being disinherited *quoad* real property, there was even more cause for guarding him against disinheritance *quoad* personalty, inasmuch as the pride of ancestry, and the wish to hand down to posterity landed estates, are likely to operate in the former case as a safeguard to the heir, which he is deprived of in the latter.”

Your Committee have not found any reason to suppose that the law of this country affecting wills, and the validity of the devises and bequests which they contain, does not afford sufficient protection against fraud or undue influence. They do not think, therefore, that it is necessary to suggest any additional provisions on that subject.

It has been proposed that charitable devises and bequests above a certain small amount or value should be rendered invalid by law, except in cases of charities heretofore legally sanctioned and established, or unless constituted in pursuance of a scheme previously approved of by the Charity Commission, or a body entrusted with similar powers. The adoption of these restrictions would interfere greatly with the freedom of testamentary dispositions, and would interpose obstacles to gifts which there is no reason for discouraging. Instead of any such restriction, your Committee think that the purposes and administration of all charitable trusts should be liable to

revision, and to a dedication to new charitable objects at the end of a definite period—a period which might properly be equivalent to the average time that property for private purposes can be now tied up by deed or will;—that is to say, a life in being and a possible minority. A certain term of thirty years, might be a reasonable limit. Upon this point your committee again refer to the important principles recognised in the Report of the Education Commissioners (pp. 476, 477) on the extent of the power of posthumous legislation, which should be accorded to the founders of charities. It would rather be an encouragement to foundations by the more intelligent and really benevolent donors, to reflect that their intentions to benefit posterity will be the subject of periodical reconsideration and revision; and that their gifts cannot therefore be perpetually devoted to purposes that, in the changes of time, may become useless or pernicious. Your Committee therefore submit that—

C. Every charitable gift or foundation made or established after shall at the end of thirty years from the time of its creation be subject to revision, and to the declaration of new purposes and trusts; which shall be so far in conformity with the original or preceding purposes or trusts as shall be consistent with the object of obtaining from them that which, in the judgment of the Committee of the Privy Council on Charities, shall be the greatest amount of public benefit such gifts or establishments are capable of producing.

Where the object of the endowment is that of training or instruction according to the special doctrines of any religious body, the power of modification, at the end of thirty years or other period, may be restricted to cases in which the exercise of such power is desired by those in whom the law which governs the church or congregation has vested the due authority.

With this security for the ultimately useful application of the gift, your Committee think that the general freedom of bequest may be left undisturbed, and governed as to its purposes by the existing principles of the Courts of Equity, which

do not permit any trust to be established that is contrary to public policy.

With the same view of accepting and preserving for the public good all that the bounty of individuals may bestow, in the place of declaring void the gifts even of mistaken and injudicious donors, or those which might be regarded as unlawful or too indefinite to be executed, your Committee recommend that the same rule of adaptation to good uses should be applied to them; and accordingly, that—

D. No gift, bequest or devise to public or charitable uses, shall be void for uncertainty or on the ground of the impolicy or pernicious nature of the object expressed by the donor or testator; but in such cases the dedication to public purposes shall be good, and the Committee of the Privy Council on Charities shall appoint another and lawful mode of appropriation.

The Education Commission has proposed that the Charity Commission be converted into a department of the Privy Council, and that the Committee of Council on Education become the Committee of Council on Education and Charities. Whether there should be a combination of the business of Education and Charities,—which as to a considerable part of their respective subjects have little connexion with each other, may be a question; but your Committee think it would be certainly beneficial to transfer the present powers of the Charity Commission to a Committee of the Privy Council, and confer upon it such powers as shall be necessary for the proper government and periodical supervision of charities, as suggested in the Report of the Education Commission, and as the exigencies of society may require. The connexion between the public department which administers the national fund granted for educational purposes, and that which has the control of endowments, in so large a measure applicable, or capable of being beneficially applied in a like manner, can hardly be too intimate. A Committee, moreover, composed of the great officers of state for the time being, would be likely to

possess the confidence of the founders and the administrators of charities and of the public at large, to such a degree as to be intrusted with powers greater than are likely to be confided to the members of a Commission. Such a Committee may be expected to take a larger view of the general as well as the particular interest concerned; and it might be left to the judgment of such a body, under the authority of a general act of legislature, on revising or remodelling each charity at the end of a period of thirty years of its existence, or at other times as occasion might require, to give it such a new direction as shall appear most for the general good.

Your Committee have in their Report followed the example set them in the paper on Charitable Trusts which emanated from the eminent Judge who presided at the meeting when the subject was considered, and have suggested a line of action rather than attempted to prepare a Bill. If the principles proposed under the foregoing propositions *A, B, C* and *D*, should be approved by the Society, there will be no difficulty in framing a measure adapted to the purpose of carrying them into effect.

ART. VI.—THE ASSIZES.

MOST of our readers have been in a county town during the Assizes, and have seen the judges going to and from the courts, escorted by the sheriff, with a score or so of javelin men, and sound of trumpet. But few are aware what a distant and different state of society these usages belong to, and what stern realities they once betokened. Time was, when the Judges of Assize, or “justices itinerant,” were not safe from the rage or revenge of any truculent baron whose ruffianism or rapine they might have to punish or repress, and

when the sheriff with all his force was scarce able to protect them. In the reign of Henry III., in the year 1224, the year before the third great charter of that King, one Faulkes seized on the Judges of Assize, then sitting at Dunstable, and threw them into the dungeon of his castle at Bedford, where he ill-treated them cruelly, in revenge for their having tried not less than thirty actions of ejectment, (as we should now call them,) brought by freeholders whose lands he had seized. The King had to raise a little army, and lay siege to the castle, in order to liberate his judges; and it took him a month or two to do so. The next year it was provided in the Great Charter, that "We or our chief justiciary will send justiciaries into every county, once in the year; who, with the knights of each county, shall hold in the county the Assizes." In order to enable them to go safely, the sheriff of each county was, and still is, bound to attend them with a sufficient force to protect them, of which the javelin men are the relics or representatives; and he is empowered, if necessary, to call out the whole power of the county, *i.e.* all the males from fifteen years to sixty; a writ for which purpose to this day remains in full force.

Centuries have passed away since the judges were in danger from knights or barons, and they are now not likely to be drawn to any baronial castle by any pressure stronger than an invitation to dinner. But it is not by any means certain that their persons might never be in danger of outrage from a casual outbreak of popular violence. The accomplished Cavendish fell, in the reign of Richard II., a sacrifice to the fury of a mob not more ferocious than that which in the reign of George III. burned the house of Lord Mansfield. Within the last twenty years, as the names of Bristol and Newport may remind us, insurrections have occurred, of which one actually arose at the holding of a sessions by an obnoxious judge; and we may easily imagine a trial arousing popular feeling so far as to raise a tumult, in which, for some brief period, the safety of the judges might be in peril. It would

be but for a brief period, so deep is the reverence felt for those who embody the majesty of the law, and so full and effective is the provision made by the Common Law for such emergencies. The sheriff has only to show himself, and throw himself on the allegiance of all loyal subjects; his simple appeal would be enough to call out the whole power of the county; his mere word would be warrant enough for any amount of force to act for the protection of the persons of the judges, and maintain the majesty of justice and the inviolability of law.

But it has taken the slow growth and progress of centuries, and many terrible convulsions, and the shedding of much blood, to bring us to this. It tasked the energies of many stern monarchs to compel all men to submit to the administration of justice, and, above all, to compel men really to administer it. Scarce seven years after the Great Charter above alluded to, and after a terrible example had been made of Faulkes by hanging not less than twenty-four of his knights and soldiers who had seized the King's judges, we find outrageous robberies committed, and among the chief abettors, we read in the old chronicle, were knights, and even *sheriffs*! Nay, "the King's chief justiciary is said to have been the chief transgressor, because he had given the robbers warrants from himself to prevent any one from obstructing them!" (Roger of Wendover, A.D. 1232.) And in another chronicle we read, that "the King visited the district about Winchester, where the justiciaries had made a circuit a little while before, but where the robbers were so banded together, that the justiciaries were not able to curb them. And a great number of criminals were apprehended, some of whom were very powerful and wealthy men, and the very persons to whom the King had entrusted the charge of protecting the district from thieves; and some were men of such high rank that they were considered equal to knights; and some were of the King's household, and they were sentenced to suffer death by hanging. And so this business was completely settled in that part of the country." (Matthew of West-

minster, A.D. 1249.) And so it had to be settled again and again in every part of the country, and by measures just as stern. And it never *could* have been settled but by the constant visitations of the judges, holding the dread powers of Justices of Assize. Age after age Assizes had to be held, and the grim terrors of the law inflicted hundreds of times in every town of England, ere the reign of law and order was established as we see it now. And of all the agencies to which it may be ascribed, none was so effective as the circuits of the judges, and the holding of the Assizes.

For at least seven hundred years, ever since the reign of Henry II., when the realm was first divided into six circuits for the purpose, the judges of the land have gone their circuits and held their Assizes; administering justice—civil and criminal. It was almost as hard to compel the powerful to submit to the one as to the other. Thus we read in the same old chronicle, that “an exceedingly violent quarrel arose between John de Warenne and Henry de Lacy, on the subject of some pasture lands. And the two chiefs prepared forces and made themselves ready for battle; the King sent his justiciaries in order to terminate the quarrel by judicial sentence, *or by reconciling the parties:*” (if they would not submit to the judicial decision:) “and they, having inquired into the truth, by means of the sworn testimony of the men of that district, adjudged the right to be with Henry de Lacy.” (Ibid. A.D. 1268.) These words, “having inquired into the truth by means of the sworn testimony of the men of the district,” very well describe the theory of our system of administration of justice at the Assizes: the principle being, its administration by a central and supreme authority, with the assistance of those who reside in the district; and so to unite uniformity of law with the advantages of a system of local trial. Thus, it is a rule of our law, both civil and criminal, to determine matters, generally, in the counties where they have arisen. Hence our system of circuits and Assizes. The object was to assert the purity of justice, in spite of local influences,

by means of the sovereign authority: and yet not to lose the benefits of local tribunals. This was no easy matter: for of course, in a turbulent age, local influences were strong; and long after order was somewhat established, the purity of justice was yet to be attained. Ancient statutes attest this all through the age of the Plantagenets, and even of the Tudors. Thus, about half a century after the era of our last extract—in the reign of Edward I., when the Crown was asserting with all its power the supremacy of the law—we read in a statute that malefactors were banded together, to beat, ill-treat, and kill, those who spoke the truth on Assizes and trials for felony, whereby the jurors, from fear of these malefactors and their threats, often dare not speak the truth, or indict the said malefactors. “And that there were those who encouraged and maintained malefactors of this kind, and who, by reason of their power and influence, took them under their protection for hire.” (Ord: 32 Edw. I.) About a century later we find (*temp.* Rich. II., 1377—1399) two statutes very significant, and showing how very difficult it was to secure integrity in judges. One enacted that no man of the law should be justice of Assize in his own county; the other, that no lord, nor other of the county, little nor great, should sit upon the bench with the justices to take Assizes in the counties of England.” As difficult was it to secure integrity in the jurors. An Act of Henry VI. recites, that indictments were often found by “jurors of no conscience and little goods;” and great care was taken to provide for challenge of jurors, for fear or favour. In the reign of Henry VII. statutes were passed to punish jurors who gave false verdicts. At the very commencement of the reign of Henry VIII. an Act was passed, showing that sheriffs returned jurors who would readily perjure themselves for corrupt purposes: and a series of statutes from Edward III. to Elizabeth were designed to repress extortions, corruptions, and oppressions of that ancient officer the sheriff, upon whom so much of the administration of justice depends.

During all this period there was a constant struggle between

the authority of justice and the turbulent spirit of the times; of which contemporary history affords amusing illustrations. The most curious thing is, that even the judges themselves partook of the character of the age, and were wont to resort to force instead of law. Thus, in the reign of Henry IV. we find a Mr. Justice Tirwit had a suit relative to a right of common, to which Lord de Roos laid claim; and the decision of it fell to the celebrated Chief Justice Gascoigne, who had appointed a day to try the cause: when the learned litigant assembled five hundred men, "armed and arrayed ageyn the pees, to lygge in wayte for the Lord de Roos, and there hym to harne and dishonare." When a judge of the Queen's Bench could so act, what might be expected from common men? The "Paston Letters" teem with similar instances; and some of our readers may remember how Caistor sustained a regular siege for several weeks, by some thousands of men, incited by a powerful peer who claimed it. It was not until the reign of Henry VII. that the Crown was really able to assert its supremacy, and so to uphold the supremacy of law. And in that reign a statute passed making it an offence for a man to regain possession even of his own land, by violent force. To this day, however, it is lawful for a man to regain possession of his land, if he can do so without violence or breach of the peace, even though it be by force. Our ancestors preferred the more summary remedy; and, as human nature has not changed, it sometimes happens, even now, that persons "take the law into their own hands," and will not wait for the Judges of Assize to enforce it for them. It was not to be wondered at that our ancestors should have been impatient of the "law's delays," for the worst of it was, that not only had they to wait long for the judges, but when they came they were not impartial. Thus, in the "Paston Letters" we read, only a generation before the accession of the House of Tudor, that the Chief Justice Prisot, because he thought that if the Assizes had been holden at Norwich, as they begun, it would not be so much in favour of certain persons, suitors, to whom he

leant, he adjourned the Assizes to another place—"the most partial place of all the shire; and thither was called all the friends, knights, and esquires, and other gentlemen, that would do as they would—and they came down with four hundred horse, and more: and it would have been right jeopardous and fearful for any of the parties on the other side to have been present." "And the said Prisot would suffer no man that was learned (in the law) to speak for them; but *took them by the nose at every third word*: which might well be known for open partiality." (Letter XXXVIII.) Truly our ancestors might be excused for distrusting such a system of justice, and preferring the plainer remedy of force.

It was not until the stern tyranny of the Tudor dynasty had fully established the supremacy of the Crown, that the supremacy of law was completely asserted, and, as between private parties, justice fairly administered at the Assizes. A long period was yet to elapse, and bloody struggles were still to ensue, ere it was secured as between the Crown and its subjects. This supremacy of law was mainly asserted by the high authority of the Judges of the Assize, who, as Lord Coke lays it down, held courts as high in dignity and authority as those of the superior courts at Westminster; a doctrine upheld by the highest oracles of our law, and stated in those very terms by its learned historian. (Reeves, "History of English Law," vol. i. pp. 49—53.) It was only by tribunals of such high dignity and authority that the supremacy of the law could be asserted in all the counties of England, even in times the most distracted and turbulent. No court not representing the Crown, in its prerogative of administering justice, in as high and plenary a sense as the courts at Westminster, could have so asserted that supremacy of the law. The very object of the Circuits and Assizes was to carry the majesty of the law, in its highest dignity and authority, to every English county. Courts regarded as inferior could never have had weight enough to embody and assert the supremacy of the Crown and the majesty of justice.

An illustration of this occurs in the biography of Chief Justice Dyer, who in 1574, at the Yorkshire Assizes, gained great credit by supporting a poor widow against the oppression of a rich knight of that shire, whose unjust proceedings were upheld by the magistrates. The knight had unjustly evicted the widow from her farm: she had brought an action and recovered judgment, and the farm was ordered to be restored to her, but the knight resisted the sheriff in the execution of the writ, and the magistrates failed to support the sheriff. The chief justice at the Assizes held them up to reprobation, and ordered some of them to be indicted. And Sir Edward Montague in 1618 spoke of his upright conduct as "still fresh in the memory of men."

This little story shows more strongly than any argument, how much the administration of justice throughout the country depends upon the authority of the Crown asserting the supremacy of the law in the persons of those who directly represent it, the Judges of Assize.

From their decision, even in matters of life and death, no appeal lay at the Common Law, save in civil cases to a court of error, just as in the case of the superior court at Westminster. No bill of exceptions lay at Common Law to the ruling of a Judge of Assize, even in a capital case. The delay created by a writ of error thereon would have been fatal to their authority; no doubt now and then mistakes would occur either on the law or the facts: but as to the law the error was not likely to be material to the real question of guilt or innocence, and as to that the jury were the judges. Sir Matthew Hale tells some terrible stories of mistaken convictions for murder, but no doubt they were rare and exceptional; and though in the last century, and from the recklessness of human life caused by a horrible penal code, since then reformed by the noble labours of Romilly and Peel, erroneous convictions even in capital cases may occasionally have occurred; a reaction has long ago set in, very strongly in favour of human life; and there is now-a-days small danger of a rash conviction: still

less of a rash execution. But it serves to show the dread nature of the powers of Judges of Assize to consider that their ruling on a point of law even now is final, although in a capital case; unless indeed they themselves think proper to reserve it, under the provisions of a recent statute. There is, however, no appeal upon the facts in any criminal case tried at the Assizes, although it be one of life or death. After conviction their mere verbal order to the sheriff to see execution done is sufficient to compel him to have the sentence of death carried out; it is not even usual to do more than sign the calendar, and that is not legally necessary, insomuch that Hale tells us Chief Justice Rolle would never sign anything in such a case; but simply direct the sheriff by word of mouth to have execution done: and in one case where the sheriff hesitated he fined him £2000. It was only, we repeat, by these terrible powers that the Judges of Assize could have upheld the supremacy of law; and these powers have lately been remarkably illustrated, in a manner to startle most men. At the last Summer Assizes for Surrey, the sheriff having put up a placard outside the court reflecting on the conduct of one of the Judges of Assize, they fined him £500, with the full approval of the Lord Chancellor and the Home Secretary. And at the last Spring Assizes for Yorkshire, Mr. Justice Hill not only fined a person who refused to answer, on the plea that he might thereby criminate himself, in the sum of £500, but committed him to gaol, where he still is; and two courts of Westminster Hall have solemnly affirmed the legality of the sentence. Men were staggered, and would scarce believe that such tremendous powers were latent in the Judges of Assize, and even lawyers doubted; but it was only by the exercise of such powers that the Judges of Assize were able through times of turbulence and brute force to assert the supremacy of law. And although it was agreed that it seemed strange to entrust such powers to one or two judges without appeal, the obvious answer is, that for seven hundred years they have exercised without question the infinitely greater power of deciding without appeal points

of law on which life and death depend, and of guiding the jury to conclusions on all matters of fact on which those dread issues rest. No doubt it has been in their discretion to reserve points of difficulty on the law for the opinion of the other judges, but only in their discretion, and to their discretion is left without reservation or appeal the duty of guiding or directing the minds of the jury upon the facts.

The jury indeed in all cases, civil or criminal, are the sole judges of the *facts*, and, at Common Law, without appeal. And though, by a curious anomaly, there is a discretionary power of granting a new trial in civil cases involving only property, there is no such power in criminal cases, even when involving life and death. Our judicial system therefore depends mainly on our *juries*; and as few probably are aware of the manner in which they are summoned and impannelled, some information upon that head may be of interest.

The sheriff is the officer of the superior courts to return and summon juries both in civil and criminal cases, though if he be interested in the suit, or next of kin to the parties, the duty devolves on one of the coroners of the county; and should the jury be summoned by a sheriff, under-sheriff, or summoning officer, either interested or related to the parties, this will be a cause of "challenge to the array." Statutes regulate the manner in which an annual jurors' book is to be formed, which book is to be kept by the sheriff, and from which he is to select the jurors. The clerk of the peace is to keep lists for every hundred, parish, and township, compiled from lists of rated inhabitants, compiled by the overseers and exposed on the church doors, arranged in alphabetical order; and from these lists the "jurors' book" is made up. If the sheriff shall return any man to serve on a jury (except the grand jury at the Assizes) whose name is not on the jurors' book for the current year, he will be liable to a fine. A sufficient time before the circuit, the sheriff shall receive the "Assize precepts," as they are called, and also notices to summon special juries. On the receipt of the Assize precepts, warrants are

made out by the under-sheriffs to the bailiffs of each hundred, directing them to summon the grand jury, to make proclamation of the Assizes, to give notice to coroners, constables, &c., to attend, and to summon the jurors named in their several hundreds. The sheriff, that is, the under-sheriff, returns forty-eight jurors to serve in civil cases, on *common* juries, and in criminal cases, (in which there are no *special* juries,) and it is left to him to select them in any way he pleases, so that he does not summon those who have served before. The under-sheriff may either go through the lists in alphabetical order, or take a certain number, casually or alphabetically, from each hundred. It is needless to say, that any dishonesty in the matter would be a high crime and misdemeanor.

Every one knows that there is a sheriff in each county, but few are aware how much of the actual working of our constitution, and especially of our system of trial by jury, depends practically upon him. It is, as we have seen, his duty to summon the juries in all cases, civil and criminal; so that he returns the tribunals on which men's lives and estates depend. Hence, by his ancient oath of office, he swears to these solemn obligations: "Ye shall truly and righteously treat the people of your sheriffwick, and do right to poor as well as to rich, in all things that belong to your office. Ye shall do no wrong to any man, for any gift or other behest, for favour or for hate. Ye shall take no bailiff into your service but such as ye will answer for. Ye shall truly make your panels (of juries) of such persons as be most meet, most sufficient, and not *suspected nor procured*." And nothing, we need hardly say, is watched more jealously than any irregularity, not to say dishonesty, in the mode of returning a jury. It looks like an anomaly, that in a criminal case, even a capital case, there is not, as there is in civil cases, a right, in either party, to have a special jury, although in many cases criminal charges—for instance, involving medical or chemical evidence—present as much difficulty as any civil cases, and, of course, far greater *responsibility*. It may be deemed some explanation of this

anomaly, that no criminal charge can come for trial before a jury until it has already gone through the ordeal of an investigation before either a magistrate or a grand jury, who, however, have only to decide whether there is a *prima facie* case, and leave to the jury who try the case the duty of deciding the dread issue of guilt or innocence on a balance of testimony. There is, indeed, a general power in the Judges of Assize to make an order, orally or otherwise, for the return of a jury for the trial of a criminal case, and this would enable them to order the return of a special jury. In that case, the jury would be summoned at the sheriff's discretion, and the accused would have no notice of the names of jurors; but in cases of treason, statutes passed just after the Revolution, in the reigns of William and Anne, require that the accused shall be furnished with lists of jurors and witnesses ten days before trial. In civil cases, the special juries were, and still may be, struck in this way. The sheriff, *i.e.* the under-sheriff, nominates forty-eight out of the jurors' books and the special jurors' list for the county qualified to serve on special juries, and this list is reduced before the under-sheriff, twelve being struck off by each side; and the names of the remaining twenty-four are placed on the "panel" for the trial of the cause, and these are summoned. And, if they all attend, there is a margin allowed for challenges; if less than twelve attend, the others are liable to be fined, unless the parties consent, as they can, to try by less than twelve. The result of this, however, was, that at least twenty-four were summoned for each special jury case; so that if there were, as at Guildford, or Bristol, or Liverpool, ten or twenty special jury cases, there would be from 200 to 400 special jurymen summoned, and detained in the Assize town for a week or ten days or a fortnight. To remedy this grievance the Common Law Commissioners recommended, and the Common Law Procedure Act has established, this improved practice—that, unless for special reason the old system be resorted to, the sheriff shall return forty-eight special jurors to try all the special jury cases at an Assize, just as forty-eight

common jurors try all the common jury causes and all the criminal cases.

There is no statutable regulation as to the persons to be summoned on the grand jury; and as in all counties it is considered an honour, the sheriff should summon the gentlemen of fortune in his county below the rank of peer. The sheriff returns, on the back of the Assize precept, the lists of jurors—grand, special, and common—and the calendar of prisoners. And copies of the lists of jurors are annexed to the record of each civil cause.

Thus then—and this is the practical result—the parties know, or may know, some time before the Assizes, the names of all the jurors who will be likely to try a case, civil or criminal, although it is not possible to know the *very men* who may try it. For example, in criminal and common jury cases it is known that a particular body of forty-eight men will try them all, but it is not known which of them will be in the Crown court and which in the Civil. And of the forty-eight returned to try all special jury cases, it is not known which of them will form the twelve who will really try a particular case.

The manner in which the jury in a *particular* case is impannelled is as follows. The under-sheriff writes the names and addition of each jurymen of the forty-eight who are summoned on the Assizes on a piece of paper or card, and puts them into a balloting box, which, with the key, is delivered to the clerk of Assize in each court, that he may draw the juries from it. This he does, on the morning of each day, by taking the cards out casually, and calling the names. So many as answer, up to the number of twelve, are impannelled, and if less than twelve answer, the names are read over again, while the crier calls for jurors in the other court or outside, and all who do not answer are liable to fine. Thus, then, it is impossible to tell beforehand what men will be put on a jury in a particular case, though in all criminal cases (except those of treason) and all common jury cases it is known that they must be taken out of a particular body of less than fifty. But all the common jurors

meet in the Assize town on the first day of the Assizes, and there remain until the end, meeting daily in court, sitting (while not impannelled) amidst parties and witnesses; meeting them during the evening at inns and public-houses, hearing and sharing in any conversation which may be going on as to any of the cases which may be coming on for trial. Here, undoubtedly, are opportunities for being subjected to prepossessions or prejudices, and out of any half-dozen jurors who may happen to be assembled, conversing on any case, the chances are of course fifty to one that one or more of them will be on the jury in that case; although, as it is only a chance, they are under no legal obligation, and may not feel under a moral obligation, to abstain from or avoid such conversation. Undoubtedly, to the writer's knowledge, such conversations do occur, and he has seen in court jurors afterwards sworn on a case talking to parties and witnesses in it. This may account for verdicts which sometimes seem explainable rather by prejudice than evidence. It is difficult to avoid this; and moreover, it is a curious fact, that previous knowledge of the parties or the circumstances of a case is not, by the Common Law, deemed to import any prejudice, or any danger to justice, but, on the contrary, is desired as an advantage to justice. On this ground it was, and is still, admitted as a principle, that jurors ought to come from the vicinity in which the matter arose, for the very reason that it may be supposed that they know something of the matter, and that the more they know the better, because thereby they are deemed to be better able to judge, especially where it is at all a question of probability depending on character, or on the usages and habits of people in a particular district, which may be very important in judging of a case. So strongly was this regarded of old, that it was not enough to summon a jury of the county, or even the hundred, but they must be of the very village where the parties lived or the matter arose. And though this is no longer so of the hundred, it still is the rule of law, that, except for special causes—among which a well-grounded

apprehension of prejudice is of course one—the trial should be in the county where the cause of action arose. Thus, therefore, it is not a legal principle that previous knowledge of the parties or of the case implies prejudice or endangers justice. It by no means follows even, that the hearing of a party's own statement of his case is likely to prejudice a man in his favour; for all men are blinded in their own cases by prejudice, and do not see what others can see quite plainly. And observations made against the opposite party are as likely to recoil on the party making them, and to raise a prejudice against himself. The previous publication indeed of the facts of a case in the county in which it is to be tried would not be deemed sufficient reason for *changing* the venue, though heated, exciting, and slanderous attacks *would* be. In point of fact, through the newspapers or through common talk there is frequently more or less known of a case in the country before it is tried. The writer once heard a very eminent judge say, in a company of distinguished advocates, that he verily believed from his experience, (and none of them differed from him,) that most causes or cases of any interest, and at all likely to be talked about, were practically settled before the judges came into the county! This sounds startling, and may seem not very much to the credit of our system of trial by jury; but the eminent judge who made the observation did not seem scandalized by it; for he added, that perhaps, after all, there was more justice in that previous judgment of the case than might be supposed, and that it might be that the *vox populi* was often the *vox Dei*. His meaning was, that supposing the case to be talked of, and to excite interest, the desire of all men would be to get at the real truth; and the general opinion of men would be very likely to be just. It may be that the true facts are known out of court before they are sworn *in* court, and a good judgment formed upon them.

Speaking generally, whatever jurors may hear of a case in the country, *before* they come to the court, must surely be

derived directly from the parties to the suit, scattered as the jurors are all over the county.

The great difficulty is, while avoiding, as far as possible, opportunity of personal influence, to afford at the same time every opportunity for acquiring such information as is necessary for the exercise of the right of challenge. This right is an invaluable Common Law right, which cannot be taken away, as the House of Lords have of late years emphatically affirmed, without express statute. It may be either to the "array," *i.e.* to the whole panel, on the ground of some irregularity of dishonesty, or "to the poll," *i.e.* to any individual jurymen. In either case it must be exercised before the jury are sworn; *i.e.* if to the "array," before *any* are sworn; if to "the poll," or to the individual, before *he* has been sworn; nay, so strict is the rule of law, that it must be before the officer has given him the book to be sworn. With regard to a challenge to the array or to the panel, O'Connell's case, which every one remembers, is an excellent illustration of the extreme jealousy with which our courts watch the preparation of the jury panels. There had been some tampering with the jury lists there, and the House of Lords set aside the trial; Lord Denman uttering the memorable words, that "such practices would tend to make trial by jury a mockery, a delusion, and a snare." Similar jealousy was shown in the case of "Sam Grey," a gentleman more than once tried for murder in Ireland, and whose case also came before the House of Lords. So in the case of Frost; it was argued before the fifteen judges on a point as technical as it is possible to conceive. All these instances show how sensitive our courts are as to the strict observance of the rules which regulate the impannelling of juries. And not only any irregularity of the sheriff in summoning or returning the lists, but any mistake of the officer in court in impannelling a particular jury, as in having the wrong number, one too many or one too few, or having the wrong man, by reason of a sameness or resemblance of name, sworn upon the jury; any such irregularity, if pointed out in time,

i.e. before verdict, will be a "mistrial," and necessitate a *new* trial. But challenges to the "array," or to the poll, as already mentioned, must be before the jury or jurors are sworn. Hence in criminal cases the prisoner is told by the officer when about to swear the jury, "If you desire to challenge any of the jurors you must do so when they come to be sworn, and *before* they are sworn." And for this purpose, in criminal cases each jurymen is sworn *separately*. In criminal cases the prisoner may challenge twenty without cause, i.e. without assigning any cause: for any reason or suspicion in his own mind; as from their being neighbours or relations of the prosecutor, or being likely to be influenced by fear or favour. In civil causes there is no right of challenge of a jurymen without cause assigned, which, if denied, must be tried *instantly*, by two jurors, supposing it to be a good cause. Interest, relationship, &c., are good causes of challenge; and generally it is for the party to discover for himself the existence of the cause of challenge; for which reason it is so necessary that the lists of jurors should be known, in order to enable him to find out all about them. Strictly speaking, supposing a man to be convicted of murder by a jury on which the father, the brother, and the son of the murdered man have sat, the verdict cannot be disturbed on that ground, as the prisoner should have challenged him; and though he knew it not, the law deems it was his own fault. And the same rule holds in civil causes; the presence on the jury of a partner of the plaintiff or defendant will not vitiate the verdict. In extreme cases, however, the court, if satisfied that the party did not and could not discover the disqualification in time to challenge, might grant a new trial. But so strictly are parties generally held to the exercise of their right of challenge at the proper time, that if in a criminal case it is found out that the prisoner has a relative on the jury, the trial must proceed. For this reason, and on account of the clannish feeling in Wales, it was found necessary in old times to try Welsh cases in neighbouring English counties, in order to secure a fair trial. If no par-

ticular objection to individual jurymen can be found out, nor any irregularity in the mode of summoning, but there is apprehension on a broader ground, that a fair trial cannot be had in a particular county, there is a discretionary power, either in civil or criminal cases, to "change the venue," as it is called, or postpone the trial, in order to avoid any local or temporary excitement. Placards, or letters in newspapers, reflecting on the character of one of the parties, have been held good ground for changing the county of trial. But the fact that a plaintiff having lectured against the Corn laws, had been placarded as the farmers' enemy, and that the defendant was much connected with the landed gentry, has been deemed insufficient; as it has been also on an indictment for a conspiracy to destroy foxes, when it was alleged that the gentry of the county were addicted to fox-hunting. But where the action was by the mayor of a town for slander, imputing perjury before an election committee, the place of trial was changed. The matter is one purely of discretion, and no rule can be laid down for its application.

Supposing a jury properly impanelled, *they* are sole judges of the facts, and in criminal cases there is no way of reversing their decision, nor in civil cases, save on grounds nearly amounting to misconduct or manifest miscarriage. It is presumed that in criminal cases they will be more careful, and it must be borne in mind that all criminal cases undergo one or more preliminary investigations before they come into court for final trial, and have been closely sifted by perhaps three, and certainly two, tribunals: the coroner's jury, the magistrate, and the grand jury. This may diminish the apparent anomaly of absence of an appeal on the facts in criminal cases. The truth is, that they have been already investigated again and again, *before* final trial; and indeed the whole period for the original inquiry, or apprehension, until the final trial, is, or may be, applied to the investigation of the case. Upon the whole, certainly sufficient care is taken of the accused, even in cases where the Crown is only nominally concerned, and

the real prosecutor is a private party; where, as in treason, the Crown *really* is party, the prisoner has the *peculiar* advantage of receiving, ten days before trial, lists of witnesses and jurors. And in all criminal cases the prisoner can challenge thirty-five jurors without assigning cause. On the other hand, though the Crown can challenge without cause until the whole panel is exhausted, it must *then*, in going through it again, assign *legal* cause, as must the prisoner after going through his "peremptory" challenges without cause. And it is only *before* the panel has been thus gone through, and the right of peremptory challenge exhausted, that the Crown can object to a juror for any reason, however good, not being a *legal* cause of challenge; *i. e.* to his competency or "unindifferency." Thus, in a case of murder tried before Mr. Baron Bramwell in 1857 at Maidstone, it being known that many persons in that part of the country (as we believe in every other) had great objection to capital punishment, several jurors were set aside by the Crown on that ground: and one avowing this feeling, was told by the judge that as he was not able to discharge his duty he had better stand aside. The prisoner, of course, objected to this, and having been convicted, was allowed by the Attorney-General to bring a writ of error to have the question argued! It was argued, and the court held, that as the right of peremptory challenge had not been exhausted, the Crown had the right of setting aside the jurors without assigning cause, (it being thus left uncertain whether the objection to capital punishment could *per se* be a legal cause of challenge,) and that the judge was right in directing the juror who avowed the feeling to stand aside; the court laying it down also, that the judge might direct any juror to stand aside, though not challenged by either party, if palpably unfit for the trial of the case. So in Palmer's case, a jurymen stating that he had formed an opinion on the case, Lord Campbell told him he had better stand aside. And the writer remembers a similar occurrence in a civil case, before Lord Chief Justice Erle, on circuit, when a special juror was

directed to stand aside on his admitting the expression of strong opinions on the case.

Every possible precaution is thus taken to secure an impartial trial; and as against the Crown, especially, or in criminal cases generally, the advantage appears to be rather on the side of the prisoner. It is a most striking proof of this, that it should have been gravely argued before a court of error, a year or two ago, whether a murderer should not be held to have been illegally tried because he had been deprived of a *chance* of escape, in spite of the clearest evidence of guilt, by two or three persons opposed to capital punishment being on his jury!

There is again one great security for prisoners and parties sued,—that the jury in a civil or criminal case must be *unanimous*, and that it is for the prosecutor or plaintiff to satisfy them *all*; and if he fail to do so, and leave any *doubt*, they are directed to find for the defendant or the prisoner, the party sued or accused. The great argument used in favour of this demand of unanimity—which undoubtedly is as ancient as the time of Alfred—is, that it *enforces* consideration and deliberation. The answer is—true, if the unanimity is *real*: but in truth it is not so; it is only apparent and nominal. The ultimate verdict, say the opponents of the system, (the most able of whom, perhaps, is Mr. Joseph Brown, in his pungent pamphlet, the “Dark Side of Trial by Jury,”) does *not* represent the really unanimous judgment of the jury: it is an enforced agreement, obtained by physical exhaustion; and merely represents the triumph of physical strength. There is good ground for this view: and there is a story of the Norfolk juryman, who, when likely to be shut up, used to send for his great coat, carefully filled with sandwiches, to enable him to hold out. The *mere* fact that the jury get eatables and drinkables while in deliberation, is not of itself a ground for setting aside the verdict, unless they obtained the refreshment from one of the parties, or from the jurors who held out against others, or by some misconduct of their own: and it may be

observed that though the *bailiff*, when a jury is locked up, is sworn not to let them have "meat, drink, or fire, candle-light excepted," *they* are not sworn not to take refreshment: so that the *mere taking* of it is not, *per se*, a breach of their oath or duty; though if they get it in a clandestine manner it may amount to misconduct. And if *during* a trial, as while it is adjourned, they, or any of them, eat or drink with one of the parties, it may be ground for complaint. There is no doubt whatever that juries do resort to all kinds of modes of evading the difficulty in which the law places them by *starving* them into agreement.

Many cases have occurred in which it has transpired that they have cast lots which way the verdict shall be; though here the courts find themselves, or fancy that they find themselves, in a great difficulty, for they do not allow a jurymen to vitiate his own verdict by making affidavit that he has determined it by lot: and the ordinary rule is, not to admit of affidavits disclosing what has passed in the jury box. There are obvious reasons for this rule, but it leads to great difficulty; and perhaps it is fortunate for the credit of trial by jury that it exists, as it has undoubtedly shut out from publicity cases of gross misconduct. Affidavits of misconduct not being admitted from the jurors, it is of course very hard to discover and disclose it. The only way in which it can be done is by making affidavit of what jurors have *said* as to what passed in the box about the way in which they should give their verdict: a roundabout and casual means of redress, it must be admitted. And, practically, it may be said that there is now no remedy for misconduct of juries; for secret misconduct they are rarely likely to talk about, and as to the mere fact that their verdict contravenes the sworn evidence, unless it is something which amounts to "perversity," there is no new trial, even in a civil case, on the score of misconduct; and no power of *punishing* for misconduct, unless it really should amount to a misdemeanor. In ancient times, juries were punishable for false or perverse verdicts, and a practice arose of

fining them if they gave verdicts obviously contrary to the evidence. But this practice has been discontinued since the Revolution; and, ordinarily, there is no appeal from the verdict of a jury, in cases civil or criminal. Not in *criminal* cases at all, nor in *civil*, unless the balance of evidence was *greatly* against the verdict, or the evidence was all the other way. The law takes the utmost care to secure a fair *choice* of jurors, and then leaves them final judges of the facts.

Such, then, is our system of the administration of justice, civil and criminal, at the Assizes; a system which for seven centuries has carried into every part of the country the majesty and dignity of the English law, and has treasured up for it such enduring traditions of reverence and awe. The more the system is studied, the more it will be seen how well and wisely our ancestors have striven to render these tribunals at once popular and venerable; uniting the authority of the Crown with the co-operation of the people in maintaining the inviolability and supremacy of law. The judges of the superior courts—coming down invested with all the *prestige* of their immemorial antiquity, and with every power which the Crown, by its commissions, can confer—gathering round them, in the grand juries, "all" the rank and wealth, and, in the common juries, all the pith and strength, of the country, guiding and instructing them all in the same noble duty of administering justice. Age after age, twice every year for seven hundred years, have these venerated tribunals been held in every county town; upholding law by the highest authority, and illustrating it by the impressive force of example; and exhibiting justice in all its dignity, and sometimes in all its terrors. No one, without some thought and reflection, can realize what England owes to its Assizes, and how much they have had to do in making our country what it is. The system, no doubt, has its weak and vulnerable points, as any human system must have; but whoever shall carefully study it, with a view to the various and opposing objects which have to be attained—weight of authority, popular co-operation, general confidence,

impartiality of administration, promptness in execution, and avoidance at once of error and delay—will find it hard to devise a system more effective for them all, and more fitted to do the work which it *has* done so well, of planting deeply and strongly in the national mind respect for justice and a reverence for law.

Since these lines were written, a learned and elaborate judgment has been delivered by the Court of Common Pleas, which has entered into this whole subject as on a great constitutional question; and Lord Chief Justice Erle, in his own masculine and vigorous language, emphatically presents that view of the ancient origin and high authority of the Judges of Assize which has been here offered to the reader's notice. "The Judges of Assize," said his Lordship, "are commissioned by the Crown to administer justice according to the law and custom of England, and for that purpose are entrusted with such high powers, *to the exercise of which*, for so many ages, is in a great degree to be attributed the reign of law and order." That great lawyer and accomplished scholar, Mr. Justice Willes, went fully into the *history* of the subject from the earliest ages, and it was with singular pleasure that the writer of this article, listening to his masterly exposition of the question, found the view he had taken confirmed on such high authority. The very point to be determined was, in substance, whether the courts of Judges of Assize are superior courts; and the court, following the decision of the Court of Exchequer, and the whole current of legal authority, held that they *were* so in effect; and further, that looking at their history and origin, the high powers of a superior court would alone have enabled them to carry out the objects of their constitution and fulfil the great purposes of their commission. It is worthy of remark that Mr. Justice Willes, in his judgment, appeals to the general impression among men created by tradition, carried down from age to age and from generation to generation, and shown by that reverence and veneration with which the Judges of Assize have been everywhere regarded, and the

existence of which is itself the strongest proof that they have for ages been faithful to their sacred trust, and have worthily discharged their high commission.

ART. VII.—OLD WILLS.

IT has long been a complaint amongst literary men that the most interesting section of our national records, viz., old wills, is a closed book to them and their labours, owing to the prohibitory duties levied upon them in respect of their researches in that direction. Though we do not profess much sympathy for mere book-makers, and have no desire to increase their number or multiply their lucubrations, we think there is a real grievance at the bottom of this complaint, and we will state our reasons for so thinking.

The present mode of custody adopted for our old wills, either shows a misconception of their real character as records, or it is merely a consequence of a former condition of things. But whichever it be, we do not think that it should much longer continue.

Three years ago, nearly all the wills of the country belonged to the Rev. Robert Moore, and his clerical associates holding office as registrars in the various Ecclesiastical Courts. At that epoch wills formed the income and livelihood of these reverend gentlemen; but in 1857 the nation purchased the freehold in these wills, and they thenceforth became national property, and all are or will shortly be deposited in the London registry of the Court of Probate. Wills having thus changed masters, conduct in respect of them which was pardonable, because explicable, in the case of the Rev. Mr. Moore, may be neither pardonable nor explicable in a new organization of things.

Before we pronounce, however, a judgment upon men and measures, we will see what the present court makes literary investigators pay for copies of the old wills which are in its custody. On turning to the fees of the Probate Court for 1857, we find the charge to be nine-pence for every folio of seventy-two words, "if the will or document be two hundred years old," besides a fee of one shilling for searching the calendar in order to find it. This charge has very much the appearance (as we have before intimated) of a prohibition upon literary investigation. It is certainly higher even than the rate charged by the Rev. Mr. Moore, so that the old grievance is in fact aggravated. The reason for raising the price is not obvious, unless it were proposed thereby to bear witness to our general utilitarianism and contempt for mere literary or curious inquiry. Whether this spirit be right or wrong we will not stop to inquire, but will continue our more modest investigation.

Taking the tariff of the Probate Court as expressive of practical experience, we might assume that a will two hundred years old is less easy to find and more difficult to copy than a will twenty years old; but the first assumption cannot be true of so well ordered an establishment as the registry of the Probate Court, and the second assumption would go to show that the court has not a competent staff of scribes and clerks for all its purposes and uses. This latter assumption, though not flattering, would seem to be the true one; and if it be the fact, leads us straight to the conclusion that the court (hard working-day court as it is) is not the best custodian of wills more than two hundred years old.

The formula which states the charge makes age a line of demarcation between wills—and justly so, for there is a date beyond which men of business, whether lawyers or laymen, never search for a will; there is a date beyond which lies the region of historical or curious inquiry, a country never invaded by the practical man, unless he be a stray searcher in quest of materials to bolster up a shaky pedigree.

With this solitary exception, men of the world never trouble the officers of Sir Cresswell Cresswell, at least in his Probate Court. They leave the research to the various societies and combinations of antiquaries; but though a mediæval will affects us, who are of the category last referred to, only in the sensation of something disagreeable to our outer senses, we have no more wish to interfere with the tastes of others in that respect than we have to object to the Premier enjoying the strains of the laureate of Bonny. The case therefore stands thus. There are old wills which the lawyer and his clerk do not care a straw for, but which some learned gentlemen and some learned societies care a great deal about, and yet the fruition of these delicacies is eventually denied to them; as to the documents themselves it is unquestionable, that though old wills have nothing to do with law, they have much to do not only with history and the curious lore of the country, but with its literature. A *catena* of wills throughout the transitional periods of the English language would form a *thesaurus* of immense value to philology; but there are very few philologists rich enough to buy copies of such wills at the present quotation, and we also have strong doubts whether there are scribes in the establishment of the Court competent, from a knowledge of the structure of letters, to decipher an antique will correctly or at all.

Taking this to be the case of the probate courts, we shall not have far to go before we find a staff and an establishment competent to all these ends and purposes: we mean the Record Office. That office, in our opinion, is the fit custodian of all old instruments, and to it should be transferred all the wills of the Court of Probate more than sixty or a hundred years old. This would rid us of the anomaly of a higher fee being exacted for the will of Sir Francis Drake than for the will of a Whitechapel butcher of the present era—of the irregularity of an arbitrary distinction being drawn between documents of the same kind, in order to charge more for the one than the other, though both should be equally and easily

legible. As these old wills are now the property of us all—the learned and the ignorant, the antiquary and the indifferent—and as only the learned and the antiquarian portion of our nationality care anything about them, we think that, in justice, facility of perusal and inexpensiveness of cost should be secured to these gentlemen. This can be done by transferring all wills of older date than sixty or a hundred years to the Record Office, their congenial and proper abode.

ART. VIII.—ROUND ON DOMICIL.

English Law of Domicil. By Oliver Stephen Round, Esq., of Lincoln's Inn, Barrister-at-Law. London: William Parker. 1861.

THE English Law of Domicil was for the first time expounded in the reign of Charles II., by Sir Leoline Jenkins. The French lawyers claimed for the Duchess of Anjou the accession to the personalty of the Dowager Queen Henrietta Maria, on the ground of her having died domiciled in France; and the learned Judge of the High Court of Admiralty, arguing on the English side, spoke of the word domicil, as “a term not vulgarly known.” Cicero translates *οἰκησις* by *domicilium*, but it is a rather curious historical fact, that within the whole compass of Greek law no trace can be found of any decision or decree on the subject of domicil. The learning on this branch of jurisprudence must therefore be sought for in other countries.

The Code and the Digest are the great repositories from which European nations have borrowed their fundamental maxims. In modern times, France, Holland, Italy, Germany, and America have produced elaborate commentaries, whereas

the books that have been written by English lawyers amount only to three small volumes. History explains this anomaly. The Law of Domicil is a branch of private international law—the result of intimate and prolonged intercourse between independent peoples. In strict theory, the laws of a country are paramount and absolute within its territorial limits; but nations, like individuals, have found that co-operation is possible only on terms of friendly concession and self-sacrifice. Thus it is that by a *comitas gentium* foreign laws become recognised within a jurisdiction originally exclusive. Before the Revolution two hundred conflicting customs prevailed throughout the French provinces. Germany remains to this day divided into Kingdoms, Principalities, and Duchies, each clinging to traditional customs and rights. Immigrants to the northern continent of America, bringing with them from their native countries strong prejudices and predilections, were compelled at the very commencement of their united existence to turn their attention to the questions of international law. Holland, long before the development of our migratory and cosmopolitan habits, had traversed the seas and established permanent settlements on the shores of distant continents. In these countries, therefore, the subject of domicil received early attention on the part of their respective legislatures. On the other hand, not until a period comparatively recent did our countrymen make friendly settlements abroad. Our alliances were formed to carry out the projects of war rather than to promote amicable rivalry in the arts of peace. Throughout a long period of our history we were fighting the battle of constitutional freedom at home, while those countries contiguous to our island warned us off from their shores by adopting a system of harsh and unfriendly laws. Until the treaty of Utrecht, in 1713, the property of British subjects who died in France without having been naturalized was liable to escheat to the Crown, by virtue of what was called *Les droits d'aubaine*. Such was the state of the law in Germany also. For centuries we remained a proud, brave, and isolated people. When our

fleets were fitted out, it was for the vindication of the national honour, or for the redress of some public wrong, not for the establishment of colonies.

Things are now materially altered. The policy of peace and good-will has, we trust, been inaugurated through the happy influences of commerce. Our alliances with foreign nations are becoming day by day more intimate and cordial, and considering the direct bearing of international law upon questions of contract, allegiance, marriage, and succession to property, the subject of domicil is fast culminating to that point of importance, that the attention of jurists and statesmen must be directed to it. From the first statute in our books to the last which received the royal sanction, there is not one enactment upon this branch of law. Great uncertainty and costly litigation are the inevitable consequences. In the well-known case of *Lord v. Colvin*, the preliminary inquiry into the domicil of the testator entailed, it is said, costs to the amount of £30,000; and the costs in *Bremer v. Freeman* amounted to £5,500. The late Lord Chancellor stated not long ago in the House of Lords that he was in great doubts whether his domicil was in Scotland or England; and Lord Kingsdown, when on a recent occasion exposing the unsatisfactory state of this branch of English law, confessed that although he had argued many cases, and pronounced many judgments on the subject, he was unable to say what constituted a domicil.

There was ample room therefore—and we may be permitted to add, there is still ample room—for a good book on the English law of domicil. Mr. Robert Phillimore's treatise, written with the ability and erudition of a sound lawyer and accomplished scholar, was published as far back as 1847, while this branch of law is considered by Mr. Cole only as regards England and France. Mr. Round seems to possess an extensive and minute knowledge of the subject, and his treatise contains materials which we hope may form the groundwork of a larger and more satisfactory work; but for this possibility,

and the great importance of the subject, we should have confined our notice of Mr. Round's book to limits better proportioned to its scope and intrinsic merits.

Since the publication of Lord St. Leonard's "*Letters on Real Property*," handy books on legal subjects have multiplied with great rapidity. Mr. Round will not object perhaps to place his treatise on the English law of domicil under this category. It was compiled during the leisure hours of vacation, from such broken notes as a barrister may make in the busy days of term. Without pretending to much research or comprehensiveness, this work, which first appeared in the columns of a weekly journal, will be found valuable on account of the recent decisions therein digested. Being confined to the English Law of Domicil, it may be considered as a complement to Mr. Cole's treatise already referred to. To give, however, some idea of the scope of the book, we may state that the voluminous works of Mascardus, Bynkershoek, and Menochius are not even mentioned, while the Code, Pothier, Vattel and Denizart are only alluded to in a cursory way.

In legal text-books method is of the first importance, next to that a terse and perspicuous style. Where accuracy is exigent, authors seem to imagine that they are entitled to immunity from hostile criticism; but having the luminous works of our great English jurists, it is not necessary to state that accuracy is compatible with good English, and that the discussion of abstruse subjects need not be of necessity obscure. In respect of style, we venture to think that Mr. Round's book is extremely defective: the phraseology is involved, confused, and sometimes unintelligible; sentences are drawn out to unwarrantable lengths, the continuity is constantly broken by clumsy parentheses, and words are selected after the most random fashion. Take by way of example the first sentence in the introductory chapter:—"The word '*domicile*,' or '*domicil*,' as it is sometimes written, is of a modern introduction into our language, and should, if we have adopted it, I apprehend; to make it our own, be written in the latter mode,

inasmuch as that spelling differs from that of all other words having the same signification in other languages." The following sentences are extracted from subsequent pages:—"A domicil of birth does not properly arise during minority, but being acquired by birth would become a domicil of origin, if continued after the party came of age; but domicils of origin, and the fact of birth or death in a particular country are never called into play except in the absence of all others" (page 15). Again, "It is the more difficult to suppose that a person may have no domicil; because it is also quite inconsistent with the general rule in this particular as to father and child, for the child always follows the domicil of the father, and the father, if he gain no other, must have a domicil *originis aut nativitatis* which the child would follow." The length of residence has always been thought an important *substratum* whereon to build a domicil; no doubt for the obvious reason, that whatever the intention of the person may have been, that is, at all events a substantive fact, or in other words an act done sufficient *per se* to constitute a domicil, or if not, wanting very slight circumstances conjoined with it to do so" (p. 21). And lastly, "It has been made a matter of argument, though never thrown out even as a dictum by a judge, but indeed an opinion expressed to the contrary, that a sojourn in a foreign country for the sole purpose of amassing property, when such a result occurs, will cause a reverter of the domicil of origin without the fact of arrival at, and residence, in that original domicil, and the dying *in itinere* being sufficient to revest the old domicil."

Such writing is, to say the least, unartistic and slovenly. Those acquainted with the subject before, will no doubt be able to detect in this cloudy verbiage some faint adumbrations of the ideas which were passing athwart the mind of the author; but the majority of readers must, we fear, entertain great misgivings as to the construction and meaning of the propositions thus enunciated.

Bad syntax, even in a law-book, is a matter fairly open to

criticism; but inaccuracy is a graver fault. To this let us now briefly advert. "According to the Roman law," observes Mr. Round, "a domicil, translated usually a habitation, is, in whatever place an individual has set up his household gods, and made the chief seat of his affairs, without any special avocation."* The original, here cut down to a meaningless fragment, runs thus. "In eo loco singulos habere domicilium non ambigitur, ubi quis larem ac fortunarum suarum summam constituit, unde rursus non sit disessurus, sis nihil avocet, unde cum profectus est perigrinari videtur, quod si rediit, perigrinari jam destitit." The language of the Code is clear. A man's domicil is "in that place where he has set up his household gods, whence he has no intention to depart unless he may be called away for some special purpose; from which, when he has departed he is considered to be away from home, and to which, when he has returned he is considered to have returned home." If the author, evidently following Mr. Phillimore, prefer to translate the phrase *sis nihil avocet* freely, "without any special avocation," it must be evident that the word "avocation" is here employed in the strict etymological sense. What portion of the original description does this clause qualify? Without doubt that which immediately precedes it, (altogether omitted by Mr. Round,) *unde rursus non sit disessurus*. Stating the proposition conversely, the Roman Law definition, according to the author's account of it, would imply this absurdity—that a man who has a special avocation in any place cannot under any circumstances acquire a domicil there.

The following is represented to be Boullenois' definition:—"A place of society where a man may enjoy the advantage of his labour." The paragraph from which it is abstracted is to this effect:—"Though it be true that man is born to be in motion, and to traverse this earth which God has given him, he is not made to dwell in all the places which necessity

* The reader doubtless would willingly have exchanged a long paragraph upon the "whelk-shell" of a "soft-tailed crab" (p. 10) for a better account of the Roman law definition of domicil.

compels him to traverse; he must have a place of repose, a place of choice and predilection, a place of society where he can enjoy, *with his family*, the advantages of his labours and cares; this place it is which we call domicil, and where a man by a kind of fiction belongs.* The inaccuracy is too obvious for comment.

The question of domicil being, however, much more a question of fact than of law, it is manifest that a definition, however logical, cannot be of much use in practice. Lord Alvanley commended the wisdom of Bynkershoek for not attempting any definition.

According to a statement made by Dr. Lushington, it seems that there are no less than fifteen definitions of this word. Forcellini's is elegant and accurate, though open to the charge of ambiguity, *domus sedes domestica, habitatio certa et diuturna*. Perhaps the best is that given in *Guier v Daniel*, Binney's Report, 349, "A residence at a particular place accompanied with positive, or presumptive proof of an intention to remain there an unlimited time."

The impression of vagueness and uncertainty left on the mind after reading Mr. Round's book arises in a great measure from his not having adopted some classification of the Law of Domicil. The whole of Chapter VIII. is an illustration of this. There the subject discussed is, whether a man may have two domicils. The Master of the Rolls, in the case of *Somerville v. Somerville*, 5 Ves. 749, stated the law clearly: "A man may have two domicils for some purposes, but only one for the purpose of succession." But it is extremely difficult to know what is the law on the subject from the chapter referred to. The French have a very comprehensive and clear division.

1. Le domicile électoral ou politique, according to which the right of voting at elections is decided.

2. Le domicile litigeux, where a man is to be sued.

* *Traité de la Personnalité et de la Réalité des Lois*,—*Coutumes, Statuts*, par forme d'Observations, Obs. 32, p. 40.

3. Le domicile élu, which decides the office of an individual's notary.

4. Le domicile de secours, i.e. the domicil of settlement.

5. Le domicile réel ou proprement dit, i.e. the domicil of succession.

A complete and satisfactory statement of the law as regards two domicils would be given by a reference to some such division, pointing out in what cases the law acknowledges a double domicil, and in what cases it does not.

These are some of the points to which we venture to invite the learned author's attention, and should another edition of the *Treatise on the English Law of Domicil* be demanded, we trust our criticism may be found deserving of some attention.

We cannot close this notice without adverting to the Bill introduced to the House of Lords by Lord Kingsdown, (and now before Parliament,) which promises to remove most of the difficulties occasioned by the present Law of Domicil, as regards the devolution of personal property. By the law of continental Europe, a will of personalty is valid if executed either according to the law of the domicil of the testator, or of the place where the will was made. In Scotland, the same criteria are adopted; while in England and America, as the law now stands, personal property cannot be validly devised unless the will be made in accordance with the law of the testator's domicil.

According to the provisions of Lord Kingsdown's Bill, every will and other testamentary instrument made by a British subject, shall, as regards personalty, be held to be well executed if made—

(1.) According to the forms required by the law of the place where the same was made, or—

(2.) By the law of the place where the testator was domiciled when the will was made, or—

(3.) By the law then in force in any part of the United Kingdom.

Should this Bill pass into law, a British subject domiciled in Russia may bequeath personalty situated in England, by a

testamentary instrument executed in Prussia, and the will, if made according to the laws of Prussia, Russia, or England, shall be admitted to probate in England, or confirmation in Scotland. This Act does not apply to the rules of the interpretation of wills, and therefore questions relating to domicile must again arise; but it is satisfactory to think that one fruitful cause of litigation is likely to be soon removed.

ART. IX. — THE PROFESSIONAL AND PARLIAMENTARY LIFE OF LORD CAMPBELL.

[NOTE.—The greater part of the following biography of the late Lord Campbell has appeared before in our pages. It was contained in No. C. of the *LAW MAGAZINE*, (February, 1853). We reproduce it now, because for some years that number has been out of print; and for some reason, probably from the interest felt in the very article which we now reprint, it became so scarce immediately upon publication, that copies of it to complete sets of our periodical have not been procurable. We have made some alterations and omissions of the original paper, but have retained the greater part of the writer's comments, even when we disagree with them. We have, moreover, brought down the biography to the time of Lord Campbell's death.—ED.]

BESIDES the gratification of a laudable curiosity, and the suggestions of lessons of practical wisdom, which flow naturally and pleasantly from the perusal of biographical sketches, imperfect in many respects though these may be in execution, historical events in themselves unimportant are invested with interest if they happen to be linked to the

exertions and the fortunes of a living man who has taken an active part in the scenes recorded. The task, at all times a delicate one, becomes more difficult, even when we carefully guard against the heats of political strife, and disdain, of course, to violate the sanctuary of private character and domestic life, by the fact of the subject of delineation being not only eminent for his attainments, but venerable by the badges of high office which he wears. Our design however, is unambitious, and if our success shall not be great, our failure cannot, at all events, be signal. Keeping steadily in view "the boundaries of biography and history," we may perhaps, by blending the more prominent details in the career of the late Lord Chancellor with brief notices of the important political and social questions which have been discussed since he first stepped into the arena of public life, succeed in presenting to our readers a sketch of Lord Campbell's life, which, if less interesting, will at least be more accurate than some of those works which he delighted to supply the public.

John Campbell, the second son of the Rev. George Campbell, D.D.,* by Magdalene, the only daughter of John Hallyburton, Esq., of Fodderance, was born at Cupar,† in the county of Fife, North Britain, on the 15th day of September, in the year 1781. He was, according to the system pursued at the Scottish Universities, even in boyhood entered as a student in the United College of St. Andrews, where he was a contemporary and companion of the late popular divine, Dr. Thomas

* Dr. George Campbell died, we believe, in the year 1825, after having, during a period of more than half a century, faithfully discharged the duties of his sacred office. We are not aware that he was the author of any published work besides the sketch of the parish of Cupar, in Fife, which appeared in the "Statistical Account of Scotland."

† "I was born," said Sir John Campbell, in a speech delivered to his constituents at Edinburgh (3rd June, 1835), "in your neighbourhood, within the sound of the Castle guns." The Frith of Forth intervenes between the site of Edinburgh and that of Cupar. Our legal readers may, notwithstanding the evil of hearsay evidence, and though not preserved in any English Reports, receive as *proven* that the Castle guns of Edinburgh are heard at Cupar in Fife.

It may be worth while to correct an error into which a writer in this Magazine has fallen, while reviewing the fourth and fifth volumes of the "Lives of the Chancellors." "Jedburgh, it would appear," says the reviewer, "was the

Chalmers.* They were the youngest students in the University, and both of them were destined to hold the most distinguished position in their respective professions.

Having resolved to devote himself to the study of the law of England, the subject of this notice proceeded in due time to London, and was, in the month of November, 1800, entered as a student at Lincoln's Inn, and became a pupil of Mr. Warren, by whom he was, along with others† who subsequently attained to distinction, thoroughly initiated into the mysteries of special pleading. In the meantime he had the good fortune (we believe, on the introduction of Sergeant Spankie) to be employed on the *Morning Chronicle* newspaper: a connexion which he knew how to turn to good purpose, and which served at the time to replenish his coffers. The habits of fixed attention, accuracy of statement, and expeditious adaptation of materials to the regular and incessant demands of the occasion were admirably calculated‡ to prepare him for the execution of a task which awaited him, and the successful accomplishment of which may be regarded as the basis of his future prosperity. For, having been called to the bar in the year 1806, he undertook the duty of reporting the cases determined at Nisi Prius in the Courts of King's Bench and Common Pleas, and on the Home Circuit. The skilful manner in which this

place of the author's birth" (vide *Law Quarterly Magazine*, vol. xxxvii., pp. 1, sqq.). It is difficult to conceive how the mistake can have arisen. The passage which seems to have suggested the notion, occurs in vol. iv., p. 367, where, in alluding to an expression, "Cowper justice," or "Cowper law," Lord Campbell remarks that it had been familiar to him from his infancy, "having been born in a town" (Cupar of course), "where the Rhadanthean procedure" (to hang a man first and try him afterwards,) "is supposed to have prevailed." And let the reader mark what follows: "My present country residence is in the immediate neighbourhood of another town," (i.e. Jedburgh, in Roxburghshire,) "likewise famous for a peculiar mode of administering the law. Jeddard or Jedburgh justice is this; that when several prisoners were jointly put upon their trial, the judge, to save the time and trouble necessary for minutely distinguishing their several cases, put it to the jury—'Hang all? or save all?'"

* Vide *Memoirs of Dr. Chalmers*, by the Rev. William Hanna, LL.D. vol. i. p. 9.

† Lords Lyndhurst, Denman, and Cottenham were, we believe, pupils of Mr. Warren.

‡ Most lawyers will, with us, dissent utterly from this opinion.—Ed.

work was executed, added to to the reputation which Mr. Campbell had already acquired for perseverance and industry. The succinctness and clearness of statement, the cautious exclusion of useless and irrelevant details, as well as the illustration of points of law, drawn from analogous cases, and appended in the form of notes—could not fail to impress members of the profession with a conviction that the reporter was in all respects qualified to take his part in the oral discussions at the bar of the courts of Common Law; and accordingly, general business began slowly, though steadily, to flow upon him, until at last it had so much increased, that, after the publication of four valuable volumes of “Reports”* he found it impossible, without doing injustice to his other professional engagements, to continue the series. At the close of his labours in this department, he frankly and gratefully acknowledged the valuable assistance which he had received from many friends, as well as the cheering encouragement which had been extended towards him by Lord Ellenborough. In the early portion of his professional career, he bestowed considerable attention on the principles of criminal law, and the forms of procedure in criminal prosecutions.† He never occupied, however, a remarkably prominent position behind the bar; and it is for this very reason that his example is eminently useful. His life, at this period, was a model of quiet plodding professional industry; and while marking the slow and sure steps by which he, unaided, advanced amidst the jostling of men of higher pretensions and more influential connxtions, the young barrister may be taught a lesson of laborious diligence, of self-denial, and self-dependence, without which no manly, no generous effort can be made or lofty end obtained. It was not until the year 1827 that Mr. Campbell was invested with a silk gown, but his practice and his income

* “Reports of Cases determined at Nisi Prius,” &c. These reports embrace decisions from the sittings after Michaelmas term, (48 Geo. III.,) 1807, to the sittings after Hilary term, (56 Geo. III.,) 1816.

† “In the beginning of my career, I practised much in the criminal courts.” Vide *Hans. Parl. Deb.* vol. xxx., February 17, 1836, when the question of counsel for prisoners was under discussion.

had been by that time so materially improved that he firmly maintained his position in the front rank at the bar, and might safely take advantage of any opportunity which happened to present itself for strengthening his political connexions, and thereby planting his foot on the threshold of the only sure path to the highest professional honours.

Accordingly, on the dissolution of the Parliament which expired with the reign of King George IV.,* Earl Grey having taken office, an auspicious era opened to the ambition of a young and pushing Whig barrister, who had from his earliest years been devoted to the interest of the party which had succeeded to power. Mr. Campbell therefore conceived it to be a favourable opportunity for extending the sphere of his influence and advancing his views by securing a seat in the House of Commons; and the borough of Stafford was the scene selected for his political début. Mr. Gisborne was already in the field, and further opposition was menaced in the person of Mr. Hawkes. The prospect of a struggle served only to test the electioneering tact of Mr. Campbell, and of his relation Major Scarlett, who accompanied him on his canvass. The latter gentleman had the reputation of being exceedingly popular among the wives and daughters of the burgesses of Stafford; and, certainly, on that occasion he must have risen high in their favour. The ladies of Stafford, if they believed or even understood all they heard on that day from the electioneering swains, must be more than usually susceptible of that which is said to be "pleasing to the ear of man and woman too;" they must surely be a "peculiar people," and, we trust, "zealous of good works." It is "quite notorious,"† said Major Scarlett, "that the ladies of Stafford are the belles of the world." "My regret," exclaimed Mr. Campbell, who displayed great aptitude in taking his first lesson in an art which he subsequently mastered, "on account of the use of rib-

* King George IV. died on the 26th June, 1830; Parliament was dissolved on the 24th July, 1830; and the writs issued for the election of the new Parliament were returnable on the 14th of September, 1830.

† Vide *The Staffordshire Advertiser* for 31st July, 1830.

bons at elections being prohibited by law is greatly mitigated by the consideration, that the women of Stafford always carried his colours with them in their own persons; for their eyes were blue and their cheeks were red." The screaming of *Hawkes* must have sounded harshly on ears attuned to these dulcet notes; and accordingly he missed his quarry. The contest was keenly carried on by both parties. Mr. Campbell spared no personal exertions to justify the partiality of his friends; and amidst the gleaming of torches and tar-barrels, he, about ten o'clock at night, addressed the assembled multitude from the windows of his hotel, even after he had wellnigh "lost his own voice in endeavouring to gain those of the burgesses of Stafford." He passed through the ordeal assigned him with great spirit and good temper; and the result was, that although Mr. Gisborne took and kept the lead on the poll, Mr. Campbell was not far behind him. He sat as one of the members for the borough of Stafford during the years 1830 and 1831.

From the first hour in which he entered the House of Commons, he, under that sense of the obligations imposed upon him by his position, which he has through life displayed, was assiduous in the discharge of his parliamentary duties. Careful in the first instance not to intrude himself unnecessarily upon the attention of the House, he applied himself to watching its temper and becoming familiar with its forms; while he, from time to time, threw out such practical hints with reference to the business transacted, as gave assurance that he was a shrewd observer of the progress of each debate, and that he could not fail ere long to prove a valuable acquisition to his party. No discussion, from a question of privilege to an anatomy bill;* no measure, whether relating to the opening of a new street,† or to the regulation of a coroner's court or a

* He conceived it to be a reproach to the law of England, that judges should have decided that the possession of portions of the human body for purposes of science, should be considered so heinous an offence as it had hitherto been. Vide *Hans. Parl. Deb.*, vol. xii. p. 315.

† The proposed opening of a street from Waterloo Place into St. James's Park, 15th February, 1832.

court of requests,* was so minute in its details, or so partial in its operation as to escape his notice, nay, his zeal outran his discretion.† One of the objects which he had warmly at heart was the amendment of the law, while at the same time he was anxious to guard against partial or hasty legislation on points which had been, or were to be, brought under the consideration of the commission to which he belonged. He admitted that the law relating to wills was, at that time, in a most unsatisfactory and anomalous state—in a most “uncivilized and barbarous state;”—three witnesses being required to authenticate a will which was to pass a quarter of an acre of land, such land being freehold; while copyhold property, to the amount of £20,000 per annum, or money in the funds, might be disposed of without even any signature. Nor was that all, for a will might be defeated upon a change of the tenure by which the land was held.‡ From day to day, Mr. Campbell continued to throw out, in language so direct and luminous as to admit of no misapprehension, either of the object he had in view or the practical character of the intellect from which they emanated, valuable hints for the moulding of this or that proposed measure into a form adapted to the attainment of the proposed end;§ and from the stores of his extensive and accurate legal

* Vide *Hans. Parl. Deb.*, vol. xii., p. 752, 8th March, 1832.

† In the debate, for example, on the disfranchisement of Evesham (18th February, 1832), upon being corrected when he was in error, by the Speaker, his apology was, that he happened not to be in the house at the commencement of the discussion. And compare the remarks of Lord John Russell, (*Hans. Parl. Deb.* Ser. III. vol. ii. p. 1156), who, on inquiry being made by Mr. Campbell as to the method proposed to be followed by ministers in relation to the measures of reform in parliament, coolly informed the latter that “if he had attended to the order which had just been read by the Speaker, he would have found,” &c. &c.

‡ Mr. Campbell, in allusion to this subject, mentioned that the late Lord Erskine, in whose favour a will had been made, lost the benefit of it in consequence of the gentleman who intended to confer the favour having, subsequently to the making of his will, suffered a recovery—with a view to rendering, as he imagined, more certain and indefeasible the gift to his legatee. The act of suffering a recovery, however, was, as every lawyer knows, a revocation of the will: the testator was mistaken, and Lord Erskine was unintentionally wronged—wronged, too, through an act suggested by extreme anxiety to ensure to him a mark of friendship and favour. Vide *Hans. Parl. Deb.*, Vol. i., p. 344.

§ On the 22nd November, 1830, when the Sussex Special Jury Bill was

reading, his memory could at any time be richly furnished with analogies and illustrations gathered out of manifold repositories, from the Reports of Lord Coke down to incidental observations which had fallen from the lips, to use the expression of Mr. Campbell himself, "of that great judge, Lord Eldon."* In short, he devoted himself, day and night, to the devising of means of improving the state of the law of England. He put his own hands vigorously to the work, and encouraged his fellow-labourers; so impatient was he, at this period, of delay or indifference, that he was perpetually adding fuel to a fire which already burned brightly, and he let slip no opportunity of inspiring with renovated zeal breasts which had never been suspected to have a lack of it. He ventured to give animating counsel to one who through life has never been supposed to be deficient in capacity or spirit. Mr. Brougham having, on the 10th of November, 1830, moved for leave to lay before the House of Commons the "Local Jurisdiction Bill," Mr. Campbell expressed his approbation of the measure, so far as it might facilitate the recovery of small debts, although he thought that it went too far. "But," continued he, "as to any threats held out against the honourable and learned member, he might with his profound and varied learning, and brilliant eloquence, defy any combination."

Although it is not our object in this article to follow the eminent subject of our memoir through all the minute and incidental occurrences in his parliamentary history,† there is

under discussion, Sir Robert Peel remarked, that the house was under great obligations to the honorable member for Stafford, for his observations on the bill, the third reading of which was accordingly postponed; and in like manner, on the 2nd December, 1830, the consideration of the Colonial Acts Validity Bill was postponed, in order that due weight might be given to the valuable suggestions which, in the course of debate, had dropped from Mr. Campbell. Vide *Hans. Parl. Deb.*, Ser. III. vol. ii. p. 628; and *ibid.* p. 746.

* Vide the debate (November 12, 1830) on the Sub-letting Act Amendment Bill; an Act which Mr. Campbell conceived ought to have been so framed as to be applicable to both parts of the kingdom, the law of England being in this respect extremely defective.

† Vide, for instance, his remarks (25th August, 1831,) on the unsatisfactory state of the laws of divorce, (*Hans. Parl. Deb.*, Ser. III. vol. vi. p. 589), and the difficulties which he admitted he experienced in dealing with the subject of secondary punishments. On that occasion, however, (30th

one topic in the illustration of which he has expended so much labour, and one favourite scheme in the success of which he has taken so deep an interest, that not to glance at it would be gross injustice to Lord Campbell, and a palpable defect in the most superficial sketch of his career. Indeed, the first time on which he addressed the House of Commons in an elaborate speech, was on the occasion to which we now allude—that of his introducing to its notice the subject of Registration: and the reception which his views met with from parliament and the country at large was so inauspicious, that it must have discouraged any man, less determined and energetic than Mr. Campbell, in his efforts to carry into operation a scheme, which, he believed, could not but be attended with public benefit. It is not, of course, our intention to expound the principles and enforce the advantages of registration, or historically to trace its progress from the middle of last century down to the present time.* It is sufficient for us to remark, that the sub-

May, 1832,) when the House of Commons went into committee on the bill for abolishing capital punishments in certain cases, Mr. Campbell said that, after much consideration and experience, he thought the bill highly beneficial. On the exploits which, through energy of character and thorough knowledge of the interests for which he was legislating, he had at an early period of his parliamentary career accomplished, Lord Campbell may reflect with honest pride and satisfaction. The amelioration of the law was the object the attainment of which he had chiefly in view when he first became ambitious of a seat in parliament; and he speedily proved the sincerity of his professions by the earnestness with which he applied himself to the laborious task. An outline of these Law Amendment Acts may be seen in the volume of his printed speeches. We can only here make a bare reference to the subjects of the enactments:—Fines and Recoveries Abolition Bill (3 and 4 William IV., c. 74); the Law of Descent (3 and 4 William IV., c. 106); the Law of Dower (3 and 4 William IV., c. 105); Prescription, or the Statute of Limitations (3 and 4 William IV., c. 27); the Execution of Wills of Real or Personal Property to be attested by *two* witnesses (9 William IV., and 1 Vict. c. 26); the modified measure affecting Copyhold Tenure (4 and 5 Vict. c. 25), and the Imprisonment for Debt Bill (1 and 2 Vict. c. 110). This last statute its author regarded as giving a greater security to the liberty of the subject than that given even by the Habeas Corpus Act. Compare *Hans. Parl. Deb.*, Ser. III. vol. xxvi. pp. 558 sqq.; and in illustration of the subject the reader may consult a pamphlet bearing the title, "A Substitute for Sir John Campbell's Summary Law for obtaining Judgment on Bonds," &c. London, 1835.

* Vide the "Registration of Deeds in England," &c., by William Haslitt, Esq., Barrister-at-Law. London, 1851. In that little work will be found a lucid outline of the origin and progress of the system of registration as well as an accurate analysis of Lord Campbell's bill. As to the Report made on the

ject had, with the sanction of Lord Brougham, while he held the Seals, been revived and advocated by Mr. Campbell. The representatives of the people, however, were either hostile to the measure or indifferent about its success; indeed, the minds of Members of Parliament had been, as he affirmed, greatly abused by misrepresentations of its nature and object.* That opposition originated chiefly among the country attorneys; a very influential class in the kingdom, who apprehended from the enactment of the measure into law a material diminution of their business, and consequently, of their annual income. Accordingly, by petitions to the House of Commons and by the exercise of their influence over a large class of members of Parliament, they, on the first movement being made by Mr. Campbell, effectually arrested his further progress. Accident combined with design to disappoint him; inasmuch as, on the very night for which he had given notice of his motion for leave to bring in the bill, a party question having drawn a crowded house and called forth an animated discussion, Mr. Campbell was, at its close, under the necessity of introducing his favourite topic amidst general confusion, and ultimately in the presence of a few straggling members, who neither knew nor wished to know anything about the registration of assurances.† The main object which Mr. Campbell had in view was simply to afford to all the means of ascertaining, by search, what deeds and instruments had been registered; and to provide a form, by observing which a deed should have the benefit of being considered a registered deed; an operation far less difficult and complicate than others which are daily going on in the General Post Office or the Bank of England.

subject by the Commission appointed in the year 1828, subsequently to the memorable speech of Lord Brougham (then Mr. Brougham) in the House of Commons, on the state of the law. Vide *Ibid.* pp. 13, 14, 15. Mr. Campbell was at the head of that Commission.

* *Hans. Parl. Deb.* Ser. III. vol. ii. p. 346; 9th February, 1831. Lord Morpeth, now Earl of Carlisle, stated that his constituents in Yorkshire had universally expressed a wish to be exempted from the operation of the bill: to such a proposition Mr. Campbell could not assent.

† Lord Campbell's Speeches, p. 429.

There was no direct opposition to the introduction of the Bill, although Sir Edward Sugden remarked that the commission which had been appointed to inquire into the laws affecting real property was authorized to investigate, but not to originate any measure; and Sir Charles Wetherell, considering the measure "fraught with the greatest mischief," earnestly hoped that the House would, during the discussion of its merits, have the benefit of every county member who might prefer having the title deeds of his estate in his own possession to their being consigned to "the recondite mausoleum of parchments which his honourable and learned friend proposed to erect." Throughout the session of 1830 and 1831, the measure was stationary: even its author and ardent advocate began to despair of success. Neither his unwearied industry nor his energy of character could surmount the obstacles which were thrown across his path.* He was deeply disappointed. Besides the gratifying of personal ambition and pursuing the road which leads to promotion, it is but charitable to believe that one motive for desiring a seat in the House of Commons had been, that he might, along with other suggestions for the improvement of the law, have the satisfaction of conferring this boon upon his country; but he was "fated to find an entire indifference to all such matters on both sides of the house." On moving the second reading of the bill,† he expressed himself as being anxious to obviate the objections of those who, without reason, he thought, deprecated the disclosure of their private affairs; and he proposed the insertion of such a clause as might guard against the apprehended evil. But the jealousy of the landed proprietors was not to be lulled asleep by coaxing and concession. At last, Mr. Campbell, losing all patience and all hope, told them plainly, "that they paid dearly for their mystery and secrecy, and had their business badly done for them into the bargain;" a taunt which was instantly parried by

* Compare his Speeches, p. 426, with Hans. Parl. Deb. Ser. III. vol. i. pp. 1233, sqq. Indeed the latter is a report from the corrected copy published by Lord Campbell.

† 26th September, 1831. Vide Hans. Parl. Deb. vol. vii. p. 258.

Sir Edward Sugden.* Night after night, session after session,—nay, parliament after parliament—was this topic introduced, in one shape or another, without any practical result: there was motion after motion, yet in the language of Coleridge,—

“Never a one,
Let it move as it might could ever move on.”

Mr. Campbell naturally betrayed symptoms of smarting under what he called “the organized opposition” to his bill; he was taunted for being on these occasions deaf to the voice of the people out of doors, a circumstance not at all reconcileable with his general opinions.† Hints had been thrown out, most unjustly, we believe, that he had himself an eye to the chief registrarship under his own bill;‡ and in consequence of the jealousies of the landed owners, the clamours of the attorneys, and the ignorance of the public, he declined pressing the bill,§ which he would at once have withdrawn,|| if he had been convinced that the public, after fully comprehending the true effects of its provisions, was decidedly hostile to the measure. It was a question, he conceived, which ought to be fairly and openly discussed; he courted an examination of its details, and from the result of such examination he would fearlessly appeal to the good sense and honourable feeling of the country gentlemen of England: for the benefits which he anticipated from the

* 27th January, 1832.

† Mr. Pollock, now the Chief Baron, slyly threw out the hint.

‡ Hans. Parl. Deb. vol. viii. p. 492, 11th October, 1831. Compare pp. 855, 868, 881. “I have refused,” said Mr. Campbell, “much higher offices than ever the chief commissioner under this bill could hope to enjoy.” Hans. Parl. Deb. vol. viii. p. 492, 11th October, 1831. In corroboration of the disinterestedness of Sir John Campbell’s conduct on another occasion, we may refer to an instance with which he himself has supplied us. On the second reading of the Court of Exchequer Bill (Scotland) he heartily approved of the abolition of that court, although “the office of Chief Baron was one which he was by law competent to hold, and the duties of which, perhaps, without overweening confidence, he might consider himself not unqualified to discharge; and it would be very agreeable if, in his old age, he should be appointed to an office which, with a salary of £4000 a year, would impose on him no further trouble than to dispose of five cases in four years.” Vide Hans. Parl. Deb. Ser. III. vol. xii. p. 202, 10th September, 1832, and 6th October, 1832.

§ 16th July, 1832. Hans. Parl. Deb. vol. xiv. p. 428.

|| 19th January, 1832. 2nd February, 1832.

adoption of his scheme were so great and so general, that even a chance of realizing them ought not to be sacrificed to prejudice. Witnesses had been examined in the select committee, and the whole subject had been considered with great care; but in defiance of a decided and almost unanimous Report in favour of it, resistance seemed to increase rather than to be abated, and a considerable period intervened before a favourable opportunity occurred for the re-introduction of the Bill. The first Report of the Registration Commissioners, which appeared in the year 1850, sanctioned and approved of a general register. Accordingly, in the year 1851, a measure for the registration of real property was recommended in the Speech from the throne. In the month of February, 1851, the Lord Chief Justice (Campbell) introduced a Bill for the Registration of Assurances in England and Wales; which, supported by Lord Brougham, Lord Beaumont, and other noblemen, was read *nem. con.*, a second time, and referred to a select committee. Finally Lord Campbell, on the 6th of May, 1853, moved the third reading of the Bill, and once more entered into a defence of the measure, as tending to give security to the purchasers of landed property, and, after a few remarks from Lord St. Leonards—who persevered in his opposition to the measure, as being impracticable, and as involving in its operation an enormous annual expenditure—it was adopted by the House of Lords.

The unremitted assiduity necessary to the acquisition of full and accurate information on the topics to which we have referred, and the intense thought expended in arranging materials and maturing these various measures, might have been fairly regarded by any man as proofs of a faithful discharge of parliamentary duties. But neither the conscience nor the ambition, nor perhaps even the mental habits of Mr. Campbell, could be thus satisfied. Besides being from day to day engaged in the harassing and exhausting occupations of his profession, in chambers and in court, he mastered the details and took an active share in the discussion of every subject

relating to the general policy of the country, whether it affected its civil or ecclesiastical affairs, the social improvement or the innocent recreation of the people.

The political opinions which he had from an early period of life cherished, led him of course to look with favour on any measure which he conceived might extend the rights and consolidate the interests of his fellow-subjects. Thus throughout all the tedious and perplexing debates which took place in the House of Commons during the year 1831; on the Reform Bill, Mr. Campbell gave a sincere and zealous, though by no means a blind and indiscriminate support, to the ministry. He protested against hasty legislation on a great question, regretting that the statutes had swollen to their enormous bulk in consequence of their being submitted to the consideration of the House without method, and merely on the spur of the moment;* and he proposed an amendment with a view to guard against an evasion of the £10 clause by the conversion of a weekly hiring into an annual tenancy. His suggestion was, that no tenant should be admitted to the exercise of the elective franchise who might be compelled to pay his rent more frequently than four times a year; and he, at the same time, with the independence of spirit which has marked him throughout his long career, met some signs of disapprobation, which were manifest among his political friends, with the declaration that he "cared not for the taunts which proceeded from one side of the House, or the dissatisfaction which might be felt on the other, so long as he boldly discharged what he considered to be his duty."† He approved of a general registry of votes, as a system which had, for many years, beneficially prevailed in Scotland.‡ He spoke in bitter terms of the borough system, and seemed to be thoroughly conversant with the process of manufacturing votes.§ He was jealous of interference with the details of the Bill, either within or with-

* September 3rd, 1831.

† Hans. Parl. Deb. Ser. III. vol. vi. pp. 625, 639.

‡ Ibid. 25th August, 1831.

§ Ibid. vol. iv. p. 1351.

out the walls of the Commons House of Parliament. He applauded the borough of Stafford for its disinterestedness,* and his native county of Fife for its enlightened support of the measure. He parried the thrust of Sir Robert Inglis, and he snubbed Mr. Hunt; the former having brought under the notice of the House† certain sentiments which, in the excitement caused by the Reform movement, had been too strongly expressed in the *Times* newspaper. Mr. Campbell thought that under the peculiar circumstances of the country, Parliament ought not to look too strictly to such ebullitions of opinion or feeling; and as he felt convinced that the mind of no member of the House had been affected by the language referred to, mischief could not spring from it, and consequently there was no necessity for interference in vindication of the privileges of parliament. The opinions of the latter were not, he maintained, the opinions of the people of England.‡ At the risk of losing some popularity in the North, he avowed that the Scottish people had reason to be satisfied with the share in the representation which had been allotted to them; and reminded his countrymen that people frequently, by asking too much, miss that to which they are beyond all doubt entitled. He objected, however, to any attempt at disqualifying the clergy of Scotland;§ and while he deprecated the idea of a body of clergy whom he revered degrading themselves into political partisans, he would not assent to a stigma being cast upon them by its being enacted that no member of that establishment should be a constituent. There was danger in rendering disaffected a class of men whom, on account of their great influence over the middle and lower classes of society, it was of the utmost importance to conciliate and attach to the

* April 10th, and vide *Hans. Parl. Deb. Ser. III. vol. iii. p. 1363.*

† March 21st, 1831.

‡ *Hans. Parl. Deb. Ser. III. vol. iii. p. 1351.* "He," (Mr. Hunt,) said Mr. Campbell, "had elicited the opinions of a few hundred thousand persons by putting leading questions to them, such as 'Would you not rather have no reform than such a reform as this?' to which a multitude naturally replied in the affirmative."

§ June 6th, 1832. *Hans. Parl. Deb. vol. xiii. pp. 489, sqq.*

State ; nor, in point of fact, would such a step have the effect of detaching from political contests any clergyman who was otherwise inclined, improperly to mix himself up with the political controversies of the day. It would, on the contrary, in conformity with the principle "*nitimur in vetitum semper petimusque negatum*," whet the appetite of those, who actually possessed of the franchise, might probably be very indifferent about exercising it.

Though too clear-sighted not to perceive, and too ingenuous not to admit, that there could not but be some danger in the practical working of a great untried measure such as the Reform Bill, he thought that the peril was distant and problematical, and might be remedied, if not wholly averted. He supported the measure, through the whole debate, in all its integrity ; and although the Bill introduced by Lord John Russell, on the formation of Earl Grey's ministry, appeared to him, at first sight, to be rather too sweeping in its range, he, on consideration, entirely approved of it as being at once safe and prudent, and, with one or two comparatively immaterial exceptions, defended it in the House of Commons with great ability, and with much accurate knowledge. The speech which he delivered, on the second reading of the Bill, and the third night of the debate, was temperate though firm, enlightened and fair. The various topics were naturally and clearly arranged ; the language was simple, luminous, and vigorous : and, while arguing in favour of the Bill, he admitted that constitutions cannot be made ; and concurred in the sentiments of Mr. Fox, that, "If by some interposition of Divine Providence all the wise men who ever lived in the world were assembled together, they could not make even a tolerable constitution ;" that is, a constitution adapted to the people which was destined to live under it.

We do not propose to fatigue the reader with a dry detail of the minor principles advocated by Mr. Campbell, or the opinions which incidentally dropped from him during this busy period of his career. On all the topics of the day he gave a

decided opinion. He, for instance, sternly resisted* the proposed disfranchisement of Liverpool on an allegation of bribery: he considered tithes, not as a tax which might be repealed,† but as property which, at the same time, he should like to see commuted: he vindicated the law as administered in British India from the charge of inflicting penalties on converts from Hindooism to Christianity;‡ and on the presentation of a petition§ for the abolition of the pilgrim tax in India, and praying that the hereditary estates of Hindoos might not be forfeited on the conversion of the owners to Christianity, he again—through doubts upon the alleged fact, and though anxious to see the blessings of Christianity extended throughout the world,—hoped that the religion of our fellow-subjects in India would be interfered with as little as possible. In short, a tolerably accurate notion of the industry of Mr. Campbell, may be acquired from an examination of his parliamentary life in the two years during which he sat as representative of Stafford, inasmuch as many of his subsequent exertions were devoted to the full development of the plans which had been already suggested by him, and as the discharge of official duties subsequently circumscribed the sphere of his more general labours.

We would not awaken even a faint echo of the political tempest which raged throughout the kingdom during the year 1832. It is only necessary to remind the reader that ministers having, on the 7th of May, been left in a minority in the House of Lords, on the Reform Bill, Earl Grey and his colleagues resigned office. Then followed a scene of much political excitement, and not a little political intrigue. The result was the speedy resumption of power by the abdicated minister upon his own terms. Mr. Campbell at that time sat in Parliament for the borough of Dudley, in Worcestershire; and having been appointed Solicitor-General, and knighted,

* Hans. Parl. Deb. vol. xiv. p. 77.

† November 9th, 1830. Compare remarks 23rd December, 1830, and Hans. Parl. Deb. vol. vi. p. 591.

‡ February 4th, 1831.

§ October 14th, 1831.

towards the close of the year he presented himself once more before his constituents,* as a candidate for the honour of representing them in the first Reformed Parliament. The rival candidate was Sir Horace St. Paul, whom he defeated by a majority of ninety votes. He challenged inquiry into his parliamentary conduct: he defied his opponents to detect a single sentiment expressed, or a single vote given, against the rights or liberties of his country; and plainly told the electors that if they, on that occasion, returned an avowed Tory, "They would be for ever memorable in the annals of infamy."† This taunt or menace was not, it would appear, forgotten by the men of Dudley, and ere long the connexion between their representative and themselves was dissolved. This circumstance, too, had been treasured up for future use by his political adversaries; for his opponent in the radical interest at Edinburgh, a Mr. Ayton, took care to remind the electors of the northern capital that "Even the paltry town of Dudley itself had rejected Sir John Campbell because he was a placeman." The elevation, however, to official dignity and influence, which, as it had been alleged, acted as a repeller among the sensitive purists of Worcestershire, proved extremely attractive to the common sense and foresight of a generation living somewhere nearer the Pole.

Sir John Campbell was now in the very zenith of his public career. The rough and most laborious part of the ascent had been passed, and the summit of the mount now brightly shone in view.‡

We may at this stage, however, seasonably retire for a

* December 10, 1832.

† Vide *Worcester Herald* for 14th December, 1832.

‡ He sat for Stafford during the years 1830, 1831; he represented Dudley from the month of December, 1832, down to the month of February, 1834; and he was returned for Edinburgh in the month of June, 1834, which city he continued to represent down to the year 1841; he held the office of Solicitor-General from the month of November, 1832, to February, 1834, when he was appointed Attorney-General. In November of that year he resigned office, and having been reappointed in April, 1835, he continued in the active and able discharge of the duties of first law officer of the Crown down to the month of June, 1844, when he was appointed, as we shall immediately see, Lord Chancellor of Ireland.

moment, from electioneering strife and the din of political debate, to throw a transient glance at his labours and his triumphs within his strictly professional sphere. We might refer to the various Common Law Reports for abundant evidence of his skill and success while at the Bar. Always wary in selecting the line of action or of argument to be pursued by him, he advanced towards his object with unerring precision and indefatigable energy; but on no occasion has he risen to a strain of fervid eloquence, nor have his lightest and most playful sallies ever smacked of genuine wit. He fenced not with the polished Spanish blade, no sharply pointed arrow left his quiver; he has uniformly fought with his native heavy claymore, and employed back-handed blows as well as orthodox cut-and-thrust. Constitutionally calm and calculating, frigid and unassailable by any temporary excitement, his understanding was ever awake to detect the weakest point both in his own case and in that of his adversary, and sufficiently subtle to weave a veil for concealment of the one or seize an instrument wherewith to lay bare the other. The main risk which he ran was, either that the juries should observe his cunning and suspect trickery; or that the court, doubting his candour, should deal with him as one of that class of counsel whom it is a duty to distrust. For the general truth of these remarks we may refer to the authenticated specimens of his forensic powers.* Among other important cases which we may enumerate as having evinced Campbell's ability, are—*Norton v. Melbourne*, (June 23, 1836); the trial of James Hastings Medhurst, (April 13, 1839); *The Queen v. Lawson*, (20th Dec., 1818). Again, the speech which he delivered for the Crown, before the House of Lords, on the trial of James Thomas, Earl of Cardigan, who was charged with the offence of firing with a loaded pistol at Henry Garnett Phipps Tuckett, with intent to murder him, is remarkable† only for having been the occasion out of which

* "Speeches of Lord Campbell at the Bar," &c., Edinb., 1842.

† February 16th, 1841. Vide "Speeches," pp. 422, 425, note.

sprang some ill-judged and we believe unfounded insinuations, that Sir John Campbell had been guilty of joining in a premeditated scheme to ensure the acquittal of the prisoner; as well as an allegation, that the line of argument pursued by the Attorney-General amounted to a defence of duelling. This charge he solemnly repelled; and viewing the matter practically as a man of the world, he subsequently vindicated the right of every member of the Bar to shape, in defiance of misconception on the part of others, his argument in such a way as may best promote the interest of his client; and maintained that there is "a great difference between a general approbation of duelling, and an admission that an officer in the army may find himself under the necessity of fighting a duel to preserve his reputation in society, and to prevent disaster from being brought upon himself and his family.* The exertions of Sir John Campbell, while conducting the prosecutions before the special commission at Monmouth, in the month of January, 1840, were of great public value and eminently successful in their results. A formidable insurrection was met, not by a suspension of the Habeas Corpus Act, or any infraction upon public liberty by the enactment of new laws, but simply by the vigorous administration of justice, in strict accordance with the ancient constitutional laws of the kingdom. And as his speech on that occasion presents a luminous outline of the law of treason, so towards the close of the same year† in his speech for the Crown on the trial of J. Hetherington, for blasphemous libel, he vindicated the right and asserted the obligation of the civil magistrate to check the circulation of any publication which assailed the foundations of morality by vilifying the Christian religion.‡

* "Speeches," pp. 480, 481, note.

† December the 8th, 1840. Compare the few remarks which fell from Sir John Campbell in the House of Commons, on the 11th February, 1836. Among other defects in the state of the law of libel, he mentioned that of the consideration of the truth in criminal cases being excluded. He thought that the truth ought always to be admitted in evidence and allowed to go to the jury. Compare *Hans. Parl. Deb.*, vol. viii. p. 6, 5th Oct. 1831.

‡ "It is utterly impossible," said Sir John Campbell, "that any govern-

Much prudence, he admitted, ought to be exercised in selecting cases of this description for prosecution; but "the law of England sanctioned not, and the administrators of the law could not tolerate; attacks upon the Christian religion;" attacks characterized, not by calm respectful reasoning, but by coarse invective and ribaldry.

It was on the 28th of May, 1834, that Sir John Campbell made, for the first time, his bow before an Edinburgh audience. He was, personally, a stranger to the electors of that city; but the adherents of the party to which he belonged had smoothed the path for his approach by rehearsing, if not exaggerating, his merits; and he felt that he, Attorney-General for England, might with good hope of success appear as a candidate to represent the capital of his native country.* He was nominated by the Lord Provost of "Auld Reekie," and was strongly recommended to the electors by Sir T. Dick Lauder, who resided in the neighbourhood and was well known to the bulk of the electors. But the tact and electioneering experience of Sir John Campbell rendered all extraneous harangues on his behalf quite unnecessary. As he had flattered the ladies of Stafford, he knew well how to coax the men of the north.

It was on this occasion that one or two expressions dropped from him which subsequently became themes of much good-natured banter, as betraying on his part a certain degree of self-complacency in the contemplation of the delightful novelty of knighthood: "Gentlemen, electors of Edinburgh, and fellow-countrymen, here is *plain John Campbell* before you, as a candidate for the high honour of your suffrages. . . . I must say that I think it rather hard on me to say, that if I had been merely plain John Campbell, I might have

ment can tolerate such a scandalous outrage as the conduct of this unhappy man (Taylor) presents. He collected a multitude of people in a public theatre, and burlesqued the most solemn rites of our religion; he had thus insulted all the feelings which the community most reverences. It is absurd to suppose that such a man can excite sympathy."

* Sir John Cam Hobhouse had been invited to stand on the Whig interest, but he declined being a candidate.

been elected, and that all hopes of my ambition being crowned with success must be for ever extinguished by the eminence to which I have had the good fortune to attain"—are sentiments which, however natural and proper to a creator of his own fortune, might have been prudently concealed; or, at all events, left to be avowed only by the partiality of friends. Throughout his appearance in Edinburgh, however, on this and subsequent occasions,† he strictly adhered to his religious and political creeds. He advocated, in the face of Scottish dissenters—a notoriously rabid race—the connexion between Church and State; he questioned the policy of vote by ballot; he abjured the notion of triennial parliaments, and bitterly rebuked Mr. Joseph Hume. His success was flattering; he was placed at the head of the poll. From that moment the connexion between Sir John Campbell and the constituency of Edinburgh became close, confidential, and perfectly satisfactory to both parties. Gradually feeling himself surer of the ground on which he trod, he was less scrupulous in the language which he employed. The address, for instance, which he delivered at Edinburgh, on the 3rd of January, 1835, was a bold, uncompromising party speech, in which he availed himself of every incident or suggestion which he conceived fitted to damage the ministry. We do not object to this in political warfare; we simply state the fact. *Alluding to the royal proclamation for the dissolution of parliament, he exclaimed, "I doubted, until I had read the proclamation, whether the present ministry could have the folly—I would almost say the wickedness—to dissolve the first Reformed Parliament that sat in Great Britain." He loudly rang the changes on the "dictatorship" of the Duke of Wellington, and scouted the popular notion of "Not men but measures," fortifying himself in abhorrence of the phrase by the opinion of Edmund Burke. While deprecating factious opposition to

* Vide the *Times* for June 2nd, 1834, and the extracts there given from the *Caledonian Mercury*.

† Vide "Speech of Sir John Campbell at Edinburgh, 3rd January, 1835, on the Present Crisis," 8vo. London, 1835.

the ministry, he added, "but if they remain or seek to remain in office, after a vote by the representatives of the people that they do not deserve the confidence of the nation and do not enjoy it, the supplies ought to be withheld." He professed himself a friend to the Church of England—although in many respects the establishment might, he thought, be improved—as well as a devoted admirer of the English Constitution; "for under a *pious king** the people enjoyed more liberty than could be expected under a president, or any magistrate periodically elected;" nor would he "trench on the rights and privileges of the House of Lords: but he wished their lordships were more enlightened, more liberal, more discerning; that they knew better the situation in which they were placed;" and at the same time reminded them, that "nothing could endanger the stability of that branch of the Legislature except the folly and blindness of the Lords themselves."

Although we are inclined to agree, with Counsellor Bird, that "it's a tiresome business this legislating," still we cannot, in justice to our readers or to our subject, refrain from pointing out, at least a few of the more prominent topics which were brought under the review of Sir John Campbell during the period which immediately preceded his retirement from the House of Commons.

Throughout the whole of the period during which he held the office of Attorney-General he took an active part in the transaction of the public business. He steadily pursued the path on which he had entered, and besides vigilantly superintending the progress of measures which had been already originated,† he continued from time to time to introduce new Bills of great practical importance.‡ He was awake to the

* These words were uttered in the reign of William IV.; the monarch, however, had sanctioned the Reform Bill. The expression could not fail of its effect upon an Edinburgh audience—Sir John Campbell knew his constituents; the word was well chosen and applied.

† March 11th, 1835; on the second reading of the Bill relating to the execution of wills, *Hans. Parl. Deb. Ser. III. vol. xxvi. p. 860.*

‡ March 17th, 1835, when he moved for leave to lay on the table of the House a Bill to improve the Administration of Justice in the Ecclesiastical

calls of justice and morality, and free from the prejudices of habit or custom, while weighing the claims of the one, and from bigotry or censoriousness in protecting the other; he vindicated the claims of both upon principles of pure reason.* Thus he conceived that there was no principle of common sense upon which counsel should not be allowed to defend a prisoner in cases of felony, as well as in cases of misdemeanor.† The freedom of parliamentary election,‡ and uniformity in the law of marriage § were each in its turn commended by him, and he was ready to be warmed into sympathy towards poking printer's devils || or perplexed ratepayers. His speech on the latter topic, delivered in the House of Commons on the 14th of March, 1836, (Mr. Spring Rice, then Chancellor of the Exchequer, having on the preceding evening moved in a committee of the whole House a resolution for the repair and maintenance of parochial churches and chapels, &c., a measure which contemplated the abolition of church rates,) was an exceedingly vigorous and argumentative reply ¶ to an equally able speech which had been delivered by the late Sir Wm. Follett. While Sir John Campbell, however, regarded the continued existence of church rates as detrimental to the

Courts. Vide Hans. Parl. Deb. Ser. III. vol. xxvi. pp. 914, sqq. Compare vol. xxix. p. 1106, 27th July, 1836.

* Vide his remarks in the course of the discussion on the Glasgow and Ayr Railway Bill, 17th March, 1837. Compare Hans. Parl. Deb. vol. xliii. p. 735. He expressed great anxiety, however, to prevent wanton desecration of the Sabbath. Vide Hans. Parl. Deb. Ser. III. vol. xxvi. pp. 410, 865.

† February 17th, 1836. Hans. Parl. Deb. vol. xxxi. pp. 499, 500.

‡ Vide his remarks on the Chatham Election, 17th and 19th March, 1835.

§ Vide the debate on the Roman Catholic Marriage Bill. Sir John Campbell said that he should be delighted to see one general and uniform marriage law for England, Ireland, and Scotland, for Members of the Established Church, and for all denominations of Dissenters. He thought that marriage should be a purely civil contract, permission being given for its celebration in a religious manner subsequently to the act of the magistrate. Hans. Parl. Deb. Ser. III. vol. xxvi. p. 1113.

|| Vide his remarks 11th February, 1836. Hans. Parl. Deb. vol. xxxi. p. 306, on Mr. Hume's motion that all Bills should in future be engrossed in a plain round hand.

¶ It was on this occasion that the skirmish took place between Lord Stanley (now Earl of Derby) and Sir John Campbell. The complaint of the latter was that Lord Stanley had made an unnecessarily severe attack upon him. It was under this impression that Sir John Campbell penned his "Letter to the Right Hon. Lord Stanley on the Law of Church-Rates."

cause of religion, and hostile to the public good, he confessed that he had but little sympathy with the dissenters in their opposition to the levy. They were not, it would appear, sufficiently enthusiastic in the cause. They "by no means showed the same energy to get rid of it (the levy of church rates) as did the church to support it. They strongly urged the adoption of a measure for the abolition of church rates; they professed warmly to approve of the one suggested, which was certainly highly favourable to them; but when the struggle came, they quailed and left the Government, without any adequate counterpoise to the enthusiastic opposition which the mistaken zeal of the Church called forth."

In the spring * of the year 1835, Lord John Russell carried by a majority of thirty-three votes a resolution for inquiry into the temporalities of the Church of Ireland, a result which, it may be recollected, led to the resignation of Sir Robert Peel, and the formation of the cabinet of Lord Melbourne. It was on the fourth night of the debate, when the convenience of the public and the impatience of the members demanded an approach at least to brevity on the part of those who intended to address the House, that Sir John Campbell once more threw out his views in a very effective speech. His leading principle was, that inasmuch as with reference to Ireland the funds of the Established Church were excessive, these ought to be reduced, and the surplus so created be applied to the education and general improvement of Christians of every denomination in that island. He ridiculed the idea that converts to Protestantism could be made by a numerous staff of "congregationless" clergymen. He doubted, under such circumstances, the reality of what had been called the *expansive* quality of Protestantism, and flatly denied that church property is inalienable. Such a doctrine, he maintained, had no warrant in reason, in Scripture, or in the law of the land. On the contrary, he denounced it as a remnant of heathenism, which, along with many other rites and practices drawn from the

* March 3rd, 1835.

same source, had been, through Papal influence, incorporated with the Papal Church. If the question were *res integra*, he might have much hesitation in assenting to a Protestant establishment in Ireland; and, at all events, he was of opinion that the nationally endowed church in that country ought to be accommodated to the religious wants of the Protestant people.

Among other ecclesiastical arrangements, he gave much of his attention, as might have been expected, to the long and bitterly vexed question respecting the annuity tax in the City of Edinburgh; a tax which is levied upon the inhabitants for the support of the clergy of the Established Church. He earnestly desired the abolition of that tax; but, at the same time, he declined, so long as it might be legally exacted, to sanction any refusal on the part of dissenters to pay it.*

The question of municipal reform was a favourite theme with him throughout the latter part of his parliamentary career;† and in the discussion of the point of privilege‡ arising out of the case of *Stockdale v. Hansard*, he took an active part both at the Bar§ and in the House of Commons.

At this period Sir John Campbell gradually withdraws from the observation of one engaged in tracing political movements in

* Vide Hans. Parl. Deb. Ser. III. vol. xxxiii.

† Vide Hans. Parl. Deb. Ser. III. vol. xxvi. 27th February, 1835. Ibid. vol. xxix. *passim*; vol. xxxi. p. 165, on which occasion he moved for leave to lay before the House a Bill to Alter and Amend the Municipal Corporation Act of the preceding year; for although that Act had, upon the whole, worked well, its operation might, he conceived, be rendered more easy and more perfect. It was not wonderful that in a measure of so sweeping a character, some amendments should be necessary.

‡ "The privilege of Parliament," says Hallam, ("The Middle Ages," vol. iii. p. 149,) "an extensive and singular branch of our constitutional law, which, in one at least of its aspects, may be traced beyond even the reign of the princes of the Lancastrian line."

§ April 23rd, 24th, and 25th, 1839. This speech is a treatise on the subject; every topic connected with it is exhausted by him. Compare Hans. Parl. Deb. vol. xlvii. pp. 1192, sqq., vol. xlviii. pp. 361, 369, and vide the remarks of Mr. Pemberton, who charged the Attorney-General with inconsistency. Ibid. p. 370. Compare, however, vol. liii. pp. 288, 294, where Sir John Campbell rebuts the charge of inconsistency which had been alleged against him. Vide also on the general subject, vol. li. in the beginning of the year 1840, vol. lii. p. 1155.

Parliament. Indeed, on the 10th of March, 1841, he is found defending himself against a charge of shrinking from his parliamentary duties, and at last he totally disappears from the benches of the Lower House.

A very critical juncture in the official history of Sir John Campbell ere long followed, and it may be useful to recall the facts in illustration of the perils and "hair-breadth escapes" to which even the most faithful and able members of an administration may in the course of political events be sometimes exposed.

The circumstances connected with the transaction to which we refer were at the time the subject of much remark, and cannot be remembered without a smile. The cabinet, upon the popularity and prosperity of which depended all the hopes of its indefatigable Attorney-General, finding itself about the middle of the year 1841 in an exceedingly precarious position, naturally felt anxious to provide for the dignity and emolument of a high legal functionary, who had long and zealously served the State. The plan originally proposed for the attainment of this end was the enactment of a statute "for facilitating the administration of justice in Equity;" but unfortunately it had been found necessary, in the preceding year, to abandon that scheme in consequence of difficulties arising with reference to a satisfactory distribution of the patronage which must have been created by the success of the measure. The subject, however, was once more submitted to the consideration of the House of Commons, by Lord John Russell; who, when he found that Parliament would not admit of its provisions being brought into operation until a few months had elapsed, with some impatience and haste threw up the Bill.

The simple and fair suggestion made to the Minister was, that the appointments under the Act should be deferred until a new Parliament had assembled. It was neither desirable nor consistent with political usage that a new and untried modification of the judicial system of the country should be carried into effect by a ministry which was on the eve of

retiring from power and of being thus withdrawn from all official responsibility; and, accordingly, the current of public opinion ran very strongly against the motives of the Ministry in its mode of dealing with its own "Administration of Justice Bill." The Ministry could not but anticipate its speedy fall. That, however, was no good reason for a vigorous Attorney-General permitting himself to be buried in its ruins; and yet such had very nearly been the fate of Sir John Campbell. Confiding in the goodwill and power of the Minister to elevate him to judicial station, he had taken no precautions to secure his re-election as representative of Edinburgh; so that when the "Administration of Justice" Bill was withdrawn, he stood, as perhaps he would have said, "betwixt the de'il and the deep sea." But hope had not expired, for Lord Plunkett was still alive. If the Irish Chancellor, venerable for his years, his eloquence, and the association of his name with much that is great in the intellectual history of his country, could be quietly moved aside, Sir John Campbell might take his place and the political puzzle be solved. The most distinguished member of the English Bar might well have been proud to hold the seals which dropped from the hands of one of Ireland's true patriots and orators; but, on this occasion, those seals were wrested from his grasp. The negotiation which was immediately opened with his lordship, on the part of the Government proved in the first instance unsuccessful. Lord Plunkett considered it due to the character of the Irish Bar to decline being a party to any arrangement by which Sir John Campbell, however eminent he might be for his knowledge of the Common Law, should be placed at the head of the Equity branch of jurisprudence in Ireland; while, at the same time, he felt the greatest reluctance to sanction a series of proceedings which the public could not but consider as a flagrant job. The affair began to assume a serious aspect; the Government was urgent, the Irish Chancellor was perverse, and the English Attorney-General was uneasy about the possible issue of the conflict. Never

had a servant of the Crown discharged his official duties with more learning and tact, with more ability and zeal, than had Sir John Campbell during five long and laborious years. His right, according to political and professional etiquette, to advancement was unquestionable; his claims were paramount, and such the Ministry admitted them to be; but men of honour instinctively shrink from undue precipitancy in unceremoniously dismissing one public servant simply to make room for another. No time, however, could be lost, and more energetic measures were accordingly adopted. There was indignation in Dublin and distraction in Edinburgh: even the address of his colleague, Mr. Macaulay, had been for a few days withheld, in the hope of his receiving intelligence as to the course contemplated by the Attorney-General, with a view to their starting fairly abreast and reaching the goal together in triumph.*

It was at this critical moment that Lord Ebrington appeared upon the scene, and succeeded in extorting from Lord Plunkett the resignation of his high office. The communication of the Lord Lieutenant, though in form a request, was in substance and spirit a command. No judge, no man of honour, could, without degradation, hold for a single day the Irish Seals after having received the letter of Lord Ebrington, who requested as a particular favour to himself that Lord Plunkett should resign, and condescended to enforce his application by an allusion, in no ambiguous terms, to the many favours which had been conferred by the Government upon the Lord Chancellor of Ireland.† A remonstrance from such a quarter,

* Vide the *Times* for 21st and 22nd June, 1831; and compare the *Edinburgh Courant* of 17th June, 1841.

† It is only fair to refer the reader to a speech delivered by Mr. Dawson, in the House of Commons, on the 6th of March, 1832, Hansard's Parl. Deb., Ser. III. vol. x. p. 1210. When we consider the many lucrative appointments which his family in all its branches, lineal and collateral, in the Church and in the law, enjoyed, we do not pretend to share in the spurious sympathy which one or two of the journals of the day endeavoured to excite on behalf of one who had contrived to endow his kindred with ample incomes from the public funds for the discharge of duties which imposed no severe demand upon the capacity or time of the various incumbents of those several rich ecclesiastical and civil offices.

and couched in such language, was decisive. Lord Plunkett immediately put himself into communication with Lord Melbourne, and forwarded to the Home Office his resignation of the Irish Seals.*

That the official position of Sir John Campbell was at this period sufficiently perplexing may be inferred from the fact that on the 17th of June he solicited the suffrages of the citizens of Edinburgh, and on the 18th he was actually Lord Chancellor of Ireland. Within a few days he was elevated to the peerage.†

In the meantime Lord Plunkett was not allowed to withdraw in silence: words of respect and sympathy met him on all hands; and if any circumstance could have soothed the irritation and chagrin produced on his mind by the haste and wanton harshness with which his resignation was pressed upon him, he must have been in some measure reconciled to his lot by the language addressed to him, on the part of the Irish Bar, by Mr. Sergeant Greene, who, as representing that body, expressed the deep sense which every member entertained of the ability, learning, patience, and assiduity which had marked his lordship's administration of the high office which he had so long filled with honour to himself and to the profession. In the course of the very brief remarks which dropped from his lordship in reply, he, after alluding to the fact that the advanced period of life at which he had arrived must, of itself, have induced him at no distant period, and independently of the events which had happened, to retire from public life, observed: "With regard to the particular circumstances which

* June 17th, 1841.

† The Queen was pleased to direct letters patent to be passed under the Great Seal, granting the dignity of a Baron of the United Kingdom of Great Britain and Ireland unto Sir John Campbell, Knight, Her Majesty's Attorney-General and the heirs male of his body lawfully begotten, by the name, style, and title of Baron Campbell, of St. Andrews, in the county of Fife."—*Gazette*, 22nd June, 1841. We must not be so ungallant as to omit remarking, that Lady Campbell had in the year 1836 been created Baroness Stratheden. Mary Elizabeth Campbell is the eldest daughter of the first Baron Abinger, by the third daughter of Peter Campbell, Esq., of Kilmorey, Argyleshire; she was born in 1796, and she married Mr. Campbell in 1821.

have occasioned my retirement, I think it a duty which I owe to myself and to the members of the Bar to state, that for my retirement, on this occasion, I am not in the smallest degree answerable. I have neither directly nor indirectly sanctioned it, and in giving my assent to the proposal which was made to me of retiring, I was governed solely by its having been requested of me as a personal favour to do so by a person to whom I owe such deep obligations that an irresistible sense of gratitude made it impossible for me to do anything but what I have done.*

The exit necessary to the regular development of the plot in the progress of this politico-judicial interlude having been arranged, the piece, supported by the coolness and skill of the actors, ran on smoothly and successfully to its very pleasant *dénouement*—the retirement of the hero into private life, with a pension of £4000 per annum. The very strong feeling of dissatisfaction which prevailed among professional men in Ireland could not be concealed. The junior members of the Irish Bar were roused into indignation at a proceeding which they chose to interpret as an insult to their entire body; nor were they altogether restrained from the expression of their sentiments by their graver and more calculating seniors. With more zeal than discretion, a requisition, to which the latter class declined being a party, was prepared and signed by the young barristers; and in furtherance of it, a meeting was held at the “Four Courts,” with a view to taking into consideration the measures which ought to be adopted in consequence of the appointment of Lord Campbell to the Irish Seals. These gentlemen repudiated the notion that their remonstrance could be regarded as unconstitutional; it was, they maintained, demanded by every consideration of self-defence, inasmuch as the privileges of the Bar had been infringed.† Whatever difference of opinion may exist con-

* Few men have been more indebted than has been Lord Campbell to the virtue of resignation; the exercise of this moral grace was on this occasion left to Lord Plunkett.

† The first resolution sanctioned by this assemblage of Irish barristers,

cerning the policy or imprudence of the course pursued by these individuals, and the principle of selection which they would have prescribed to the Ministry of the day, there can be no doubt that in Dublin a very strong feeling prevailed against the appointment of Lord Campbell to the Irish Seals. Those who were unwilling to withhold from him the tribute of praise which he had earned by his industry and talents, could not be reconciled to the unscrupulous precipitancy with which the arrangements had been concluded. The notoriously precarious position of the Cabinet gave much meaning and weight to the storm of discontent, amounting in some instances to disgust, which burst forth from the public press of England and Ireland. So deep was the unfavourable impression produced upon the minds of Tory, Whig, and Radical, that much lukewarmness was anticipated on behalf of the ministerial interest at the elections, which were not far distant. But while all these explosions of patriotic and professional wrath had well-nigh frightened the isle from its propriety, Lord Campbell was quietly preparing himself for a visit to Ireland; a visit which he knew was to be a very short one, and which, although it could not fail to assume, with reference to some of its accompaniments, a sort of mock solemnity, he further knew was to be followed by a speedy retirement and a substantial reward. Accordingly, on the 28th of June, Lord Campbell landed at Kingston, and proceeded to the Irish capital. On the 2nd of July the inner and outer Bars of the Court of Chancery were crowded with members of the profession, all anxious to catch a glimpse of Lord Plunkett's successor. The new Chancellor having entered the Court, about eleven

was—"Resolved, that, inasmuch as all judicial appointments in England are made from the English Bar, so all judicial appointments in Ireland ought to be made from the Irish Bar." Another objection taken by the meeting to Lord Campbell was, that he had no acquaintance with practice in Equity, and that they would really have to instruct him in its very elements before they could submit to his decisions. We conceive it to be due to the character of the senior members of the Irish Bar to state, that besides declining to attend the meeting referred to, they drew up and published a protest against the above resolution. Vide the *Times* of 24th June, 1841.

o'clock, intimated that he could only hear short causes before *closing* the sittings: he heard one or two such causes; and, on the following day, along with the sittings closed the judicial career in Ireland of Lord Campbell.*

Before the end of July he had taken his departure for England, leaving behind him not one single trace of official duties discharged or public benefits conferred. At the conclusion of the sittings, no doubt after Term, he delivered an address † to the Bar on the necessity of reform in the administration of justice in Courts of Equity, a topic which must have sounded strangely in the ears of men who had recently avowed—whether correctly or in error, is quite another question—that they had no confidence in his knowledge of the science which it was his duty to expound and apply. The vague general remarks which on this occasion fell from his lordship formed a striking contrast to the pointed and well-chosen sentences of valedictory respect which he had, a few months before, in the name of the Bar, with much simplicity, feeling, and discrimination, addressed to Mr. Justice Littledale, on the occasion of the retirement of that venerable Judge from the Bench.‡

The whole of these proceedings were questionable in their inception, precipitate in their progress, and extremely ludicrous in their close. An Attorney-General ought to take the chances of his party, and must rise or fall with the Cabinet whose servant he is. Though Sir John Campbell had, as we have seen, during many years laboured with ability, zeal, and success, and, as the first law officer of the Crown, had vindicated the law of England by the manner in which he had conducted prosecutions of the highest public importance. Though moreover his relationship with his northern constituents had been materially and unfavourably affected; yet the propriety of urging his claims upon the Ministry at that particular juncture

* Lord Campbell resigned the office of Lord High Chancellor of Ireland at Trinity Term, 1841, after a tenure of it extending to sixteen days. He was succeeded by Sir Edward Sugden.

† July 17th.

‡ February 8th, 1841.

admits of no question to our minds. "Wisdom is ever justified of her children." Sir John Campbell knew that even prospectively he was right in taking the position he then occupied; for by sacrificing his retiring pension he could offer a bonus to any Ministry which might be willing to avail itself of his valuable services. The transaction, though a subject of much comment, of declamation, just obloquy and sarcasm, at the time when it occurred, was speedily hidden from public view amidst the dust raised by the elections which immediately followed. We have recalled the incidents interwoven with it as being illustrative of an instructing episode in the history of parties. If a shade was from the state of the political atmosphere thus thrown athwart the path of Lord Campbell, it was only that he might ere long emerge into sunshine.

One of the most fatal and melancholy characteristics of a feeble intellect is, that under a reverse of fortune it is too apt to become sluggish and inert, even should it avoid sinking into a state of listless apathy. The whole structure of Lord Campbell's mind, as well as the habits which he had through life carefully fostered, proved his safeguard during the interval of his retirement from the judicial office. As a peer of the realm he applied himself conscientiously to the discharge of his parliamentary duties, and withheld not from the public the advantages to be derived from his sagacity and sound legal learning in the hearing of appeals from inferior courts—as, for instance, the Court of Session in Scotland. To one possessed of less active capacity, or not so deeply impressed with a sense of the value of time, such occupation might have proved an apology for seizing the opportunity, after so many years of toil, of indulging in desultory reading or frivolous amusement. But Lord Campbell was resting upon his oars only that he might pull out again into the full current of the stream. Before the lapse of many years he gave to the world ample evidence of his industry in a new sphere. His early attraction towards literature sprung up anew, and yielding to his impulses, he set himself to work on legal biography. He

was indeed ludicrously covetous of literary fame, and the "proud position of an author" inflamed his imagination. It is beyond the scope of our design, however, to criticise his *Lives of the Chancellors and Chief Justices*.*

Those who have been readers of the *LAW MAGAZINE* know that he made serious depredations on our domain. Without selfishly barring our portals against any who, belonging to the guild of literature, would moderately cull from our pages, we have reason to complain of unacknowledged pillage. His lordship seems to have been impressed with the value of the maxim of one of the most adventurous heroes of a rival clan:—

"For why? because the good old rule
Sufficeth him, the simple plan,
That they should take who have the power,
And they should keep who can."

Lord Campbell was indeed one of the most unscrupulous pirates who ever beat round the coasts of literature. From others he stole more extensively than even from us; and although at first his books gained some popularity from their gossiping character, yet their slip-slop style and lack of authenticity will prevent their ever taking a permanent position in literature. But these productions, however lengthy and elaborate, seem to have been the results of hours of private recreation; for Lord Campbell never disappeared from the stage of public life.

The hour in which his honourable ambition was to be gratified at last arrived. Towards the commencement of the year 1850, the health of Lord Denman, although somewhat improved, was still far from being in a satisfactory state; and it was generally felt, and as generally regretted, throughout Westminster Hall that he could not much longer sustain the weight of his office.

* "The *Lives of the Lord Chancellors and Keepers of the Great Seal of England*, &c. by John Campbell, A.M., F.R.S.E." The first series, published in 1845, brings down the memoirs to the period of the Revolution in 1688, in the second series they are continued down to the death of Lord Thurlow, in the year 1806, and the third series comprises the period between the death of Lord Loughborough, in the year 1783, and that of Lord Eldon, in 1838. The *Lives of the Chief Justices of England*, from the Norman conquest till the death of Lord Mansfield, appeared in 1849. Vide *LAW MAGAZINE AND REVIEW*, vol. xliii. p. 1.

In the course of Hilary Vacation he resigned ; whereupon John Lord Campbell was appointed Chief Justice of the Queen's Bench, and having been called to the degree of Sergeant-at-Law, on which occasion he gave rings with the motto, "*Justitie tenax*," he took his seat in court on the first day of Easter Term. His legal knowledge, his thorough familiarity with all the details of practice in the courts of Common Law, the experience of a long professional life, admirably qualified him for the high office to which he had been elevated. Accordingly, he speedily gained the confidence of the Bar and of the public ; and by his skill, his urbanity, and his respectful attention to the suggestions of his colleagues on the Bench, as well as his kind forbearance towards even the youngest member of the Bar, he day by day inspired men of all parties with confidence in the integrity and general rectitude of his decisions. The truth embodied by Quintilian in the advice which he gives to a public advocate is extremely applicable to Lord Campbell :—

"Verum hæc breviter omnia ; judex enim, ordine audito, festinat ad probationem et quamprimum certus esse sententiæ tuæ cupit.*

Even the defects which adhered to him as a counsel or an orator were now no longer felt. A display of warmth and eloquence which might have given more animation and beauty to his speeches at the bar was neither required nor expected, nor would be proper in judicial decrees. The valuable qualifications of a judge are a power of rapidly and clearly comprehending the facts of a case, and discriminating between the various points involved in it ; a profound knowledge of the law, and an aptitude in applying its principles to this or that combination of events ; along with the gift of the acquired habit of lucid, concise, and pointed statements. Now these were features in the mental character of Lord Campbell ; and accordingly his decisions have been regarded by the profession in all its branches as sound and satisfactory.

* Quintil. Instit. Orat., lib. IV., cap. 3.

At no period of his career did Lord Campbell submit to being made the tool of a party. On all occasions he vindicated his independence by thinking and judging for himself. On the occasion, for instance, of the debate on the Reform Bill, he submitted, as we have seen, to the consideration of the House of Commons views not generally approved by the party with which he acted. This self-respect at once sprang from, and was proof of, the intrepid manliness of his character; and since he became a member of the Upper House—and, as a matter of course, felt himself to be less than ever bound in the trammels of party—he found freer scope for his matured opinions and his enlarged constitutional views. In illustration of this statement we may be allowed, without even hinting at political relations foreign or domestic, to refer to the subject of the City of London deputation to Louis Napoleon; which, as may be recollected, was hailed by some as the harbinger of international peace and goodwill, while by others, who were not filled with the spirit of romance, the movement was supposed to have originated among parties interested in various mercantile speculations throughout France, and who, being anxious to obtain additional concessions and more substantial patronage from the French Government, were naturally enough not indisposed to bow down before the double-seated throne of Mammon and the Emperor. We profess to know nothing of the secret history of that deputation; it probably, like many other schemes in human life, may be traced to a mixture of folly and selfishness. The weak vanity of these City politicians is scarcely even to be regretted, inasmuch as the measures adopted by them afforded to Lord Campbell an opportunity of offering to them such advice, and administering to them such gentle rebuke, as may serve, for the future, to check demonstrations of a similiar nature, by reminding civic dignitaries that an embassy to a foreign potentate ought to be accredited from Downing Street, and not from the precincts of the Mansion House or the Exchange. The Earl of Clarendon, no doubt, conceived that his “honourable and

learned friend" had invested the affair with an importance which it really did not deserve; but the Lord Chief Justice of England took a different view of the matter,* and without impugning the motives of those who were more directly implicated in the proceedings, authoritatively declared that they had been guilty of a violation of the law in addressing a foreign power in the name of the people of England, and that such communications could be legally made through our ambassadors alone. His lordship fortified his opinion by a reference to various high authorities, and mentioned particular instances in which the principle had been recognised. He could have no wish to interrupt the cordial understanding between the two countries, but he at the same time, in unequivocal terms, maintained that Sir James Duke had been guilty of a misdemeanor.

Lord Lyndhurst and Lord Brougham had been at this period wont, particularly on questions involving points of law, to turn the scale on one side or another. Lord Campbell stepped in, and claimed to some extent at least to offer his opinion on such questions. He, however, invariably failed to acquire that influence over the minds of the members of the Upper House which either of these ex-Chancellors can at all times command; he was not even certain that his remarks would be received with candour and attention. For this occasional apparent indifference on the part of the peers to Lord Campbell, for the coldness of a reception which might otherwise have been genial, he had himself in a great measure to blame.

He seemed to forget that the tone of sentiment prevalent in the House of Lords is totally different from that temper which pervades the ambitious, and calculating politicians of the House of Commons. In the course of his life he uttered bitter sayings concerning the deliberations and decisions of the peers; and such ebullitions, dropping from him during party debate, might still be remembered to his disadvantage. On other

* 4th April, 1853.

occasions, however, he made ample reparation for the few violent sentiments which escaped from him under the excitement of parliamentary reform. He was likewise impatient of an expression of opinion on the part of a political adversary. He occupied an invidious position in the conversation which was carried on in the House of Lords* concerning the restoration of the family of Drummond to the honours and dignities of the earldom of Perth. Generous sentiments fell from the lips of men belonging to all parties: from the Lord Chancellor, (Cranworth,) from Lord Lyndhurst, from Lord Brougham, and from the Earl of Aberdeen. Lord Campbell alone deemed it necessary or becoming to moot the question of the merit of rival clans, to moralize on "civil and religious liberty," and to celebrate for the thousandth time the undisputed blessings of the Revolution of 1688. And again, why should not even the Chief Justice of England have listened calmly and patiently to such a man as Lord St. Leonards—who, like Lord Campbell, has won his honours by merit alone—while expounding an Act of Parliament? The interruption to which we refer† was unseemly, and the apology or explanation which the rebuke administered by the Earl of Derby to Lord Aberdeen, on the necessity of keeping his "subordinates" under proper discipline, drew from the peccant peer was far from being intelligible or satisfactory.

His suggestions and services on the subject of Law Reform,‡ after his accession to the peerage, were very valuable, many of them bearing the impress of sagacity and dispassionate

* 7th June, 1853.

† 30th May, 1850.

‡ Vide Lord Campbell's concurrence in some remarks which fell from Lord Cranworth on the 14th of February, 1853. Vide also, the proceedings in the House of Lords on the 10th of February, 1853, when he laid on the table a copy of the rules which had been framed by the judges in accordance with the provisions of the Common Law Procedure Act, on which occasion he expressed his confidence that the recent legislation and the new rules would tend materially to the better administration of justice; at the same time he submitted to the consideration of their lordships his Bill for amending an Act introduced by Lord Lyndhurst with a view to admitting parties to bail, pending writs of error, in criminal prosecutions. The object of Lord Campbell's Bill was to guard against inconveniences which had in certain cases been found inseparable from the operation of the then existing Act.

reasoning. While, for instance, he condemned a system through the operation of which the rights of parties were made necessarily to depend not on the justice or real merits of the cause, but on the astuteness or perverted ingenuity with which a pleader might weave a web of technicality and chicane, and therefore approved of the new Acts relating to special pleading, he never concealed his opinion, that however simplified the law might be, it would be ridiculous to anticipate an era when every man should be his own lawyer. Law he considered to be a science—a science which can be mastered only by severe, well-directed industry, and much profound thought. Men he conceived—and in this he agreed with Lord St. Leonards—could no more be their own lawyers than they could be their own physicians; and he apprehended that, even if a code* were produced, judge-made law could not possibly be superseded. There is, indeed, as much law of the latter description in France as in England; nay, the reports of cases in France are more bulky than our own Law Reports. Besides, cases not exactly foreseen must be continually arising in societies so

* On this subject, however, the language of Mr. Hallam, (*View of the State of Europe during the Middle Ages*, 9th edit. vol. ii. pp. 123, 124,) whose varied learning and habit of vigorous thinking must command attention and respect, is worthy of serious consideration. "Later times," says he, "have introduced other inconsistencies, till the vast extent and multiplicity of our laws have become a practical evil of serious importance, and an evil which—between the timidity of the Legislature on the one hand, and the selfishness of the practitioner on the other—is likely to reach, in no long period, to an intolerable excess. Deterred by an interested clamour against innovation from abrogating what is useless, simplifying what is complex, and determining what is doubtful, and always more inclined to stave off an immediate difficulty by some patchwork scheme of modifications and suspensions than to consult for posterity in the comprehensive spirit of legal philosophy, we accumulate statute upon statute and precedent upon precedent till no industry can acquire nor any intellect digest the mass of learning that grows upon the panting student; and our jurisprudence is not unlikely to be simplified in the worst and least honourable manner—a tacit agreement of ignorance among its professors. Much, indeed, has already gone into desuetude within the last century, and is known only as occult science by a small number of adepts. We are thus gradually approaching the crisis of a necessary reformation, when our laws, like those of Rome, must be cast into the crucible. It would be a disgrace to the nineteenth century if England could not find her Tribonian." Compare an extract from Whitlocke, ("Comment. on Parliamentary Writ," vol. i. p. 409,) *Ibid.*, given by Mr. Hallam, in a note, at page 124.

artificially constructed as those of the modern states of Europe ; and the conflicting interests interwoven with such social combinations can be satisfactorily ascertained, and respective rights settled, only by the judges, who thus become interpreters of the written law, and are, to that extent, law-makers. Lord Campbell was perfectly correct in his remark, that the great merit of the Code Napoleon consisted in its having substituted for the various systems which had previously prevailed in the different provinces of France one law common to the entire kingdom.

The entire life of Lord Campbell has been one of continuous labour : of much thought in solitude, and of harassing anxiety in his public avocation. Sooner or later, this unrelaxed tension of the mental faculties leaves behind it traces of greater exertion than human mind or frame can healthily bear ; he seemed, however, to have been by nature formed for endurance. Tall and stoutly built, he was, when young, the very impersonation of athletic power. No stranger even who passed him hurrying along of an evening to his chambers in the Temple could have mistaken the earnest nature and active habits of the man, who, with a gentle stooping of the shoulders, and eyes fixed thoughtfully on the ground, strode along heedless of, and undisturbed by, the moving scene around him. In Court, however, his attitude was erect as his manner was bold. On all occasions he proved true to the spirit of his motto—*Audacter et aperte*. His great merits as an advocate were clearness of apprehension and natural shrewdness ; but they occasionally degenerated into cunning and trickery, more or less plausibly veiled. Without possessing any extraordinary ingenuity, he displayed closeness of reasoning, directed and illustrated by suggestions drawn from more than an average stock of legal knowledge. Not a ray of what is called genius warmed his soul or irradiated his style. Even in his most ambitious efforts his most ardent admirers could discover not one of those elements which have rendered memorable the orations of Erskine or Brougham in England, or of

Curran in Ireland, and still less a particle of that playful fancy and sparkling imagery which, dropping from the lips of Francis Jeffrey, threw a halo, for a time, around the Bar of Scotland. A certain awkwardness of conception and of manner seemed inherent in him; but he in a great measure succeeded, if we may be allowed to use a phrase which was applied to Mallet, "in clearing his tongue of his native pronunciation." He never, highly and carefully laboured though some of his speeches are, reached the point of what has been emphatically called "cumbrous splendour." They are specimens of strong common sense conveyed in direct, unaffected vigorous language. They are rational, but totally unimpassioned, and are not calculated to inspire, as they certainly did not spring from, the glowing impulses of the genuine orator.

These imperfections, however, were not felt by an audience watching him in his judicial capacity. He carried with him to the Bench qualities of mind even more nicely adapted to the sphere in which he was thenceforth to act than these—undisputed as in many respects his forensic talents and attainments were—had proved to be in the province of the profession which he left behind. Although no feature of a great judge was strikingly prominent in Lord Campbell, he possessed a considerable variety of faculties and attainments, which gave to all, assurance of decisions emanating from a disciplined and accurate mind. His complexion, once fresh, became latterly pale; and the countenance, in its expression naturally grave and thoughtful, betrayed the marks of long-continued and exhausting toils; but still the forehead, capacious and serene, the clear, scrutinising eyes, the lips compressed, the quiet, self-possessed demeanour, all showed that the intellect was alert, and equal to the duties of judicial business.

As a member of the Legislature he was, perhaps, the most consistent party man of the present day. But holding strong party views he was never, as it has been alleged the late Lord Cottenham was, a political bigot. Drawing his principles

from the creed of Fox and Burke, as these were advocated and expounded by Tierney, Macintosh, and Romilly, he has shown but little sympathy with the party latitudinarianism of the present day. Believing the truth enunciated by a profound historical writer, that "there is something more sacred than prerogative, or even than the constitution—the public weal—for which all powers are granted, and to which they must all be referred," *salus populi suprema lex* has been Lord Campbell's watchword throughout the whole of his long career. Political rivals—enemies he had not—have repeatedly borne testimony to his enlightened, liberal, and moderate views. In Parliament, he professed himself to be an advocate for fair dealing, and to shrink from taking advantage of opponents.*

He affirmed also that he held in proper abhorrence all "catching bargains," and in the arrangement of matters too, affecting only himself, personally or professionally, he frequently protested that he was ready to waive his claims, if by so doing he could promote the public convenience.†

The consistency of his conduct in political warfare was by his friends ascribed as much to his sense of moral integrity as to the vigorous grasp his mind had in early life taken of the leading doctrines of his political creed. His mental faculties were well poised. The language in which Voltaire delineated the intellectual character of a far greater man may truly be applied to Lord Campbell: "*Son esprit etait juste, ce qui est*

* He objected to the second reading of the Liverpool Disfranchisement Bill (Hans. Parl. Deb. vol. xii. p. 1414, comp. vol. xiii. p. 398) on the grounds that the members for Liverpool were not then present in the house.

† Such certainly was the general disposition of Lord Campbell while he was a member of the Lower House. There was, however, an exception: Sir James Scarlett (afterwards Lord Abinger) having moved the second reading of the "Judgment and Execution Bill," Mr. O'Connell said that it was past twelve o'clock, and as there was a whole handful of legal Bills to be forwarded, he moved that the second reading of the Bill should be postponed till the following day; Mr. Campbell concurred in thinking that it would be desirable, at that late hour, to postpone the discussion. The Bill proposed considerable alterations in the law, and ought not to be passed as a matter of course. Sir James Scarlett, however, thought that it was "highly wrong for one or two individuals to stop the business of the House, and considered it beneath the dignity of the House to allow itself to be defeated by one individual."

le fond de tous les vrais talens;" a truth which was recognised by Coleridge, the profoundest thinker of the present age, when he said that our intellectual powers have their source and origin in the moral, inasmuch as "all speculative truths begin with a postulate: they all suppose an act of the will; for in the moral being lies the source of the intellectual."

Whatever may have been Lord Campbell's views as to particular arrangements and modifications of the ecclesiastical system of this country, he never withheld his sanction from the great principle of the expediency of a connexion between Church and State.*

Above all, he turned with national pride and satisfaction to the economical church establishment of his native country; an establishment which in doctrine and discipline harmonizes with the religious notions of the great mass of the people; and it has always been in such moments, while his mind spontaneously reverted to the scenes of early life, that Lord Campbell, knitting with them, nay, tracing to them, the intellectual achievements of his manhood, has not sought to conceal the consciousness of innate strength and his honest triumph in successful toil. His friend Wilkie, the painter, was wont, in an hour of genial recreation,† to say, "Though born in the manse, I have a patent of nobility." Lord Campbell, born in the manse,‡ has, without a figure of speech, indeed won the honours of the peerage.

* Hans. Parl. Deb. vol. xxvii. p. 654.

† Vide "Lives of the Chancellors," vol. v. p. 477, note.

‡ "Sir," said Mr. Campbell on one occasion, "it is my boast that I am the son of a minister of the Church of Scotland, who for fifty years was pastor of the same flock."—Vide Hans. Parl. Deb. vol. xiii. p. 489, 6th June, 1832. Again, "I am affectionately attached to the Church in which I was reared, and of which my father was a venerated pastor," 13th March, 1836. Indeed, his well-known attachment to the "Kirk" has sometimes, it would seem, brought him into disrepute; for we find him (vide Hans. Parl. Deb. Ser. III. vol. xxxvii. p. 667) defending himself against a foolish accusation that he had justified the assassination of Archbishop Sharpe. The truth is, that he had reprobated the act, and had alluded to it only in illustration of the state of public feeling in Scotland during the reign of Charles II., a state of feeling which, originating in a system of persecution, practised by all parties, has never since been extinguished in the "Kingdom of Fife" or throughout Scotland generally.

That man may be deemed fortunate whose virtues conduct to wealth, rank, and civic renown ; but, after all, the greatest recompense is lodged in his own mind. The consciousness of a life well spent in the exercise of faculties bestowed for the attainment of legitimate ends, and in the prosecution of aims which elevate and enrich the moral character, are to old age the most fertile sources of consolation. Lord Campbell fought the battle of life valiantly ; and not only was he a soldier well rewarded with the plunder of the field of glory, but he enjoyed also that greatest privilege of the warrior—the happiness of domestic life and love.

In every era of civilized society childhood has been conducted by age into the presence of genius and of virtue, with a hope that some latent spark might perhaps be kindled, some nascent chord touched. Thus Pope was in boyhood conducted into the presence of Dryden, as if with a prescience that the mantle about to drop ere long from the departing prophet was destined to fall on the shoulders of his youthful worshipper. Lord Campbell, in his professional infancy, caught a transient glimpse, on which he delighted to dwell, of one of England's greatest lawyers * in extreme old age ; and to that happy moment may perhaps, without romance, be traced the quickening influence of honourable ambition which was to fit him for the duties of a more practical profession and the struggles of a more utilitarian age,

Although he may not have possessed the various intellectual graces which adorned his fellow countryman, Lord Mansfield,† he has at least rivalled his success.

* He, when he had been only a few days entered a student of Lincoln's Inn, having been admitted below the bar of the House of Lords when Lord Eldon was sitting on the woolsack, had the gratification of hearing Lord Thurlow express his opinion on an important point connected with the law of divorce. Vide "*Lives of the Chancellors*," vol. v. p. 473.

† The reader cannot have forgotten the lines which Pope addressed to his accomplished companion and friend in his imitation of Horace's "*Ode to Venus*," Book IV. Ode 1.

"To number five direct your doves,
There spread round Murray all your blooming loves ;

Thus far did the biographer of 1853 carry his narrative. We have little to add: Lord Campbell remained Chief of the Queen's Bench till, by an odd shuffle of the cards of political life, he was promoted in 1859 to the chancellorship, though by most persons this appointment was regarded as a temporary arrangement, to be maintained only until Sir Richard Bethell could be spared from the House of Commons.

Lord Campbell had but a short space of time to earn reputation as an Equity Judge, and his cautious character and painstaking habits prevented him from committing himself on the few occasions on which he had the opportunity of so doing. He was rather disposed, it seems, to take the safe course on appeal cases and affirm the decrees of the courts below. The exceptions to this general scheme being judiciously selected and quite in harmony with the opinions and experience of Equity counsel. But he no more flinched from work as Chancellor than as Chief Justice: no one could charge upon him that he ever spared himself trouble. Labour was to him not only a duty but a habit, and probably a pleasure. With the exception of showing bad taste in commenting upon Vice-Chancellor Wood's judgments, (on which proceeding at the time we observed severely, and we still believe not too severely,*) while he occupied the post of Chancellor he cast no discredit on that high office.

In the preceding pages our biographer has in his remarks given his impression of Lord Campbell as a Common Law Judge, and to a great extent we agree with his estimate; but though there is no reason for thinking that Lord Campbell was unfair towards litigants, yet it is our opinion, as well as that of many who had good opportunities of judging, that at

Noble and young, who strikes the heart
With every sprightly, every decent part;

"Equal the injured to defend,
To charm the mistress, or to fix the friend;
He with a hundred arts refined
Shall spread thy conquests over half the kind," &c.

* 10 *L. M. & R.* p. 403, February, 1861.

nisi prius and in the criminal courts he exercised more art than was consistent with candour in swaying juries, and thus unduly affecting verdicts. It used to be said by the leaders, who felt and saw this with indignation, "You can't lay hold of him,"—and indeed he generally conveyed his impression by manner and emphasis. He was wont ominously to shake his head, solemnly lifting his hand in a warning attitude, saying, "*But*, gentlemen, *you* must judge of this piece of evidence. It *may* be true, and then God forbid that we should disbelieve the testimony to the detriment of the defendant. But it is your duty to say if you do and if you *can* give credence to the statements I have just read. Gentlemen, I have read it to you,"—and then, looking over his spectacles with a countenance which filled every jurymen's mind with scepticism as to the evidence before them, he would add,—"*It is your* province and not mine to decide what value, as men of intelligence and experience, you can attach to this kind of evidence." No judge whom we ever heard, attempted in summing up by tone, gesture, and by-play—points which one could not adduce in moving for a new trial—to influence juries so much as the late Chief Justice of the Queen's Bench!

Another of his qualities—which is less admirable in a judge even than the one just mentioned—was the habit of seeking for applause from the audience. He positively coveted the clapping of hands and the cheers of bystanders: some commonplace piece of claptrap about the "danger of Popery," or "our glorious constitution," was addressed to the surrounding public, and reiterated when it had produced the welcome round of applause.

It was his ambition to be considered an orator whose natural bursts of eloquence rendered people incontinent of noisy approbation. But he was no orator either on or off the Bench. He wished to be reckoned among scholars; but he was not a scholar, though he could prepare a quotation from a classical author, which he invariably lugged in with palpable awkwardness. He aspired to be deemed a wit, but even his humour

was poor, and depended chiefly upon efforts of memory. Of anecdotes, he had, it is true, a large store, but they were not select nor always apposite, and not unfrequently he attached them to the names of the wrong persons. He moreover even ventured to take a place among connoisseurs of the fine arts, and at a Royal Academy dinner dilated on pictures with an audacious platitude which it was wonderful to listen to. To what, then, did Lord Campbell owe his great success? First of all, he was a strong man, with a hard head, a fine digestion, and good circulation. He was canny, persevering, industrious, and self-reliant. He never conceived so high a standard of excellence as to be disgusted or dismayed with himself for falling short of it. He was moreover a lucky man apart from his great qualifications. His was the triumph of mediocrity; and by living eighty years, and preserving his natural constitution, capacity for work, and his connexion with politics and party, he achieved the highest position which the profession offered. He was, we believe, older when he ascended the Queen's Bench than was Lord Denman when he resigned, though the dates which were given at the time made him out a year younger. If he had been a man of ordinary power, he would have given up seeking for preferment after his few weeks' tenure of the Irish Chancellorship; but he was of wonderfully vigorous and durable structure, and a quarter of a century more than usual of working life was turned by him to good account.

One point more in connexion with Lord Campbell strikes us as somewhat remarkable—we mean the slight feeling which has been evinced on his death. Whether it was that not being sympathetic in his nature he was not popular among his acquaintances, nor excited the regard of those with whom he associated we do not know. But it seems to us that hardly any public man, though even of less eminence than Lord Campbell, and who has been removed by death in the midst of the activity of public life, has been so little lamented. Even in the House of Lords he was allowed to pass away with little notice. *It is*

true the generous nature of Lord Brougham prompted him to enumerate in graceful language before the peers the excellent qualities which it is but due to Lord Campbell's memory to admit he possessed. But besides Lord Brougham and Lord St. Leonards no other lawyer, and with the exception of Lord Granville, no other peer, was found to address one word to the House about the sudden event which had cut off from among them their speaker. We do not complain of this, for insincere laudation of the dead is no more admirable than the unworthy adulation of the living. But we have also observed, with less satisfaction, in certain quarters a tone of criticism less favourable to his lordship's name now that he no longer keeps the Great Seal. The candid biographer should speak the truth of a man so far as he knows it, whether he be living or dead, and if he can't do this he should hold his peace.

Notices of New Books.

[* * It should be understood that the notices of new works forwarded to us for review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

A Treatise on Wills. By Thomas Jarman, Esq. The Third Edition, by E. P. Wolstenholme, M.A., and S. Vincent, B.A., of Lincoln's Inn and the Inner Temple, Barristers-at-Law. In two Volumes. London: H. Sweet, 1861.

IN a recent Number of the *LAW MAGAZINE*,* a learned contributor, and one who knew Jarman well, told us in graphic language what manner of man this great jurist was, and under what adverse circumstances he composed his works. We do not call them "immortal works," as this would be language which an enthusiastic conveyancer only (if there be such a being) might display on the impulse of the moment, when overpowered with gratitude and a sense of the utility of the works of the learned author in question. We always, indeed, avoid the word "immortal" in describing legal literature, for we feel not only that "all that is bright must fade," but that much which is learned will become obsolete, and in the course of a generation or two of legislators and jurisprudents such works as those of Jarman may, by reason of changes, gradual or sudden, occasional or radical, become uneditable and useless.

Besides this, let it be noted, that "judge-made law" is rapidly increasing. We have made a calculation, rough, but yet on sufficient data, which shows that there are about one hundred and ten new cases reported in every year relating to wills only. One hundred and ten judgments per annum, settling, unsettling, distinguishing, confirming, and overruling, are calculated of themselves in the process of time to improve old law books off the face of the legal world; and that this result has not been already attained with "Jarman on Wills," arises from two facts, 1st, that the book is intrinsically good, especially in determining and analyzing principles; and 2ndly, that it has had, and we will say now has, the good fortune of being well edited.

To speak of the present edition, we report that the editors, Mr.

* *L. M. & R.*, vol. X. p. 251 (February, 1861).

Wolstenholme and Mr. Vincent, have performed their difficult task accurately, intelligently, and diligently, and after a lengthened examination of these two volumes, we feel justified in asserting positively that they have not overlooked any modern case of importance bearing on the subject. Moreover, the editors have not acted as mere registering machines of new cases; they have with discrimination and ability given in the text the effect of new decisions, and pointed out how far these have overruled, confirmed, or varied former decisions. In a word, the edition is excellent.

There is yet one point to which we wish to draw attention. We have lately felt it our duty to complain in these pages of the great length of time which occasionally is allowed to elapse between "going to press" and the publication of a legal work, so that statutes passed and cases decided, perhaps a year or a year and a half before the day of publication, are, if noticed at all, crammed into two or three pages at the commencement of the volume as addenda, or tacked to its end as supplement. The editors of the third edition of Jarman on Wills have now proved that such delay is quite unnecessary. These two bulky volumes contain together upwards of 1,800 pages, and references to more than 5000 cases, most of which are cited more than once, and many of which are cited three or four times, and yet we find that the edition went to press on the 1st of February last, and was published on the 1st of May following. The publication of so extensive and important a legal work as this in so short a space of time—probably never before thought possible—reflects the greatest credit, not only on the editors, but likewise on the printers and publisher, without whose co-operation no industry on the part of the editors could have effected such a result.

The Law relating to the Probate, Legacy and Succession Duties, in England, Ireland, and Scotland: including all the Statutes, and the decisions on those subjects: with Forms and Official Regulations. By Leonard Shelford, Esq., of the Middle Temple, Barrister-at-Law. Second Edition. London: Butterworths, 1861.

WHENEVER we see the name of Mr. Shelford as author or editor on the title-page of a new book or new edition, we feel assured that all that industry and experience can do has been done to make the work complete in every respect. The present volume forms no exception to this general rule. The work, although called a second edition, is in great part entirely new. When the former edition was published the Court of Probate had not been instituted, and that edition, moreover, did not contain the statutes relating to Ireland or Scotland, which the present volume comprises, so that in these respects alone very great alterations and additions have been made by Mr. Shelford to his original work.

The arrangement of the volume is as follows:—Chapter I. treats of the Stamp Duties on Probates and Letters of Administration.

Chapter II. contains the Legacy Duty Acts relating to England and Ireland. Chapter III. is a lucid treatise on the construction of the Legacy Duty Acts, in which all the cases on these Acts decided up to the date of publication are duly noticed. Chapter IV. contains a preliminary treatise on the Succession Duty, followed by the Succession Duty Act itself, with references and authorities subjoined. So anxious was Mr. Shelford to incorporate in his work the latest important case on this Act, that the publication of the volume was delayed in order that it might contain a notice of the judgment of the House of Lords in the case of *Braybrooke v. The Attorney-General*, delivered on the 19th March last, and which is presented in the addenda, from the shorthand writer's note.

The appendix with which the volume closes contains forms and regulations relating to Probate and Administration matters, Legacy and Succession Duties, &c. &c., all of which will be found to be of great and frequent use.

On the whole, Mr. Shelford's book appears to us to be the best and most complete work on this extremely intricate subject.

A Selection of Precedents in Conveyancing, designed as a Handbook of Forms in frequent use. With Practical Notes. By Francis Housman, of Lincoln's Inn, Barrister-at-Law. London: V. & R. Stevens and Sons, 1861.

MR. HOUSMAN in this moderate sized volume has presented to the conveyancing branch of the profession an excellent selection of precedents and forms in daily use in chambers and the office. Every conveyancer, we presume, has his especial favourite book of precedents, with every page of which, including various remarks therein by his own fingers, and marks by his pupils' thumbs, he is perfectly familiar; but most practitioners, knowing the proverbial advantage to the archer of a multiplicity of strings, are more or less acquainted with, and to a greater or less degree use, several collections of precedents, according to their supposed qualities and repute; indeed, the conveyancer who by habit (and it seems with some almost an intuition) can render the various collections of printed forms subservient to his daily use, has augmented the drawing power of his chambers to a very considerable degree.

Mr. Housman's collection contains common forms in purchase deeds, mortgages, settlements, and wills; and precedents of purchase deeds, mortgages, settlements, wills, bonds, disclaimers, appointments of new trustees, &c. &c. The forms, none of which are of a special or elaborate character, are good; and although here and there some unnecessary verbiage may be found, yet they can by no means be considered as lengthy. The compiler's aim has been not to supply a handbook of forms drawn in the shortest style possible, but of forms of established merit. The manner in which the precedents and "variations" are printed renders the use of the volume

extremely easy, and we know of no work of the kind which contains within the same limited number of pages, and consequently at the same moderate price, so extensive a collection of forms readily applicable to the various exigencies of the draftsman.

Mr. Housman, moreover, has not encumbered his pages with foot-notes, but has added to his volume an appendix containing practical notes, which, with the exception of a good gloss of considerable length on bills of sale, have reference principally to the provisions of the statutes of Lords St. Leonards and Cranworth.

We believe that this volume will soon, and deservedly, occupy a high place among collections of precedents in conveyancing.

The Constitutional History of England since the Accession of George III., 1760—1860. By Thomas Erskine May, C.B.
Vol. I. London: Longman and Co., 1861.

THE great merits of this work, and the importance of the subject of which it treats, render it necessary that we should devote a larger space to it than we can afford in the present number; we therefore reserve our observations upon it for a future occasion.

The Law of Nations considered as Independent Political Communities.
On the Rights and Duties of Nations in Time of Peace. By Travers Twiss, D.C.L., Regius Professor of Civil Law in the University of Oxford, and one of Her Majesty's Counsel. Oxford: at the University Press. London: Longman and Co.

THIS is the first part of a treatise on the Law of Nations, and is devoted to the rights and duties of nations in time of peace. The second part will embrace the rights and duties of nations in time of war. This work is, like the last, reserved for future and fuller comment.

A Treatise on the Law of Inland Carriers. By Edmund Powell, Esq., Inner Temple. London: Butterworths, 1861.

THERE are not many treatises devoted exclusively to the exposition of this branch of the Law of Bailments. The earliest we have been able to find was that written by Mr. Jeremy, in the beginning of this century. The second, of which Mr. George Frederick Jones was the author, appeared in the year 1827, twelve years after the issue of Mr. Jeremy's book. These productions, whatever merit they may have possessed, and however valuable they may have proved at the time, are inadequate to meet present wants. There are only two English text-books on this subject which can now be considered of any value to the practitioner or to the public; we mean "the Law of Carriers," by T. Chitty and L. Temple, published

five years ago, and Mr. Powell's treatise, which, curiously enough, bear the same date of publication. The latter has had the good fortune to pass into a second edition. The two chapters on the Railway and Canal Traffic Act, 1856, are quite new, and the recent cases under the provisions of that statute are analysed in lucid language. Being confined to the law of Inland Carriers, many topics are omitted, which may be found expounded at length in the modern work to which reference has been made, and still more elaborately in a large octavo volume written by Mr. Joseph Angell, the American author. In concluding this brief notice we may observe, that some of the judges have exhibited an inclination to depart from the established legal meaning of the term *common carrier*, and to remove from it the ingredient of insurance, which by the Common Law is considered to be its prominent and differential quality. "I deny," observed Maule J. in *Crouch v. London and North Western Railway*, 14 C. B. 255, "that a man who is not an insurer of goods is therefore not a common carrier. A common carrier who makes no stipulation, and gives no notice with respect to the insurance of goods, is no doubt liable as an insurer of the goods, but a common carrier, who by notice limits his liability, still remains in all other respects a common carrier : and even in that respect he is a common carrier ; because, although the incident of being an insurer does not apply to him, that is simply because it is especially provided for." Considering that the Common Law idea owes its origin to a state of public insecurity and primitive modes of transit, almost unknown to this age, it may be a question whether a common carrier ought not to be placed on the same footing as other bailees, and, in the absence of a special contract, be liable only for negligence.

The Magisterial Formulist; being a complete Collection of Forms and Precedents for practical use, in all Cases out of Quarter Sessions and in Parochial Matters, by Magistrates, their Clerks and Attorneys; with an Introduction, Explanatory Directions, Variations and Notes. By George C. Oke, Assistant Clerk to the Lord Mayor of London, Author of the "Magisterial Synopsis," &c. &c. Third Edition, enlarged and revised. London: Butterworths, Fleet Street, 1861.

WHAT Chitty's Archbold is to the Common Law practitioner, what Daniell's Practice was to chancery men, what Davidson's Precedents are to conveyancers, such are Mr. Oke's works to those engaged in magisterial duties. Can we use higher praise? If we could we would, because a really genuine book of practice is beyond price. This, the *third*, edition is destined, we doubt not, to be swallowed up with the same avidity as is usual with this author's publications. The "Formulist" will save much waste of brain tissue to the practitioner and some costs.

Stone's Practice of Petty Sessions, &c. By Thomas Bell and Lewis W. Cave, of the Inner Temple, Esqs., Barristers-at-Law. London : V. & R. Stevens and Sons.

THIS portable, compact, and well-written volume has also met with decided success. The seventh edition differs from the last in the addition, first, of the section upon stating a case for the opinion of a superior court of law under the 20 & 21 Vict. c. 43 ; second, of the Chapter on the general mode of procedure in cases not falling within 11 & 12 Vict. c. 43 ; third, of sections on the practice under the Juvenile Offenders Acts and the Criminal Justice Act 18 & 19 Vict. c. 126 ; fourth, of a list of summary convictions.

The editors, strictly adhering to the original design of the work, have struck out several sections which appeared in former editions. Those sections treated in a cursory manner of certain special subjects, arbitrarily selected, and it was wisely decided, that in a small volume of 600 pages, such imperfect notices had better be altogether omitted. For the magistrate's study at home this will not supply the place of Oke, Burns, or Archbold. It is what it professes to be, a mere manual : and as a manual it is quite complete. A number of forms are supplied in the Appendix, sufficiently copious to enable a magistrate to transact the ordinary business of a justice of the peace, but in unusual cases some more elaborate work, like the Magisterial Synopsis, must be consulted. The plan—first thought of, we believe, by Mr. Oke—of making a tabular arrangement of offences and their penalties, has met with general approbation, and is now partially carried out in Mr. Stone's work.

A Treatise on Facts, as Subjects of Inquiry by a Jury. By James Ram, Esq., Inner Temple, Barrister-at-Law. London : William Maxwell.

THIS Treatise, professedly written for the assistance of juries, contains a mass of heterogeneous matter, disposed with curious incongruity. It exhibits the industry and, perhaps, scholarship of the author rather than his good judgment. Two or three old stories are well told ; and the incidents taken from State Trials will be found interesting to those who may not have read them before. We defer further criticism till our next Number.

An Essay on Professional Ethics. By George Sharswood. Second Edition. T. & J. W. Johnson and Co., Philadelphia, 1860.

WE learn from the preface that Mr. Sharswood's Essays were originally published under the title of "A Compend of Lectures on the Aims and Duties of a Professor of the Law, delivered before the Law Class of the University of Pennsylvania." Each page of the Essay bristles with topics which interest lawyers. We cannot discuss them

in this Number, and we decline to say one word now lest we should be betrayed into writing a whole essay. Some recent cases, and others still pending at the English Bar, and the too frequent scandals in the other branch of the profession, make the subject of Mr. Sharswood's little volume of peculiar interest.

The Law of Sales of Personal Property. By Francis Hilliard, Author of "the Law of Vendors and Purchasers of Real Property," "The Law of Torts," &c. Second Edition, greatly enlarged and improved. T. & J. W. Johnson and Co., Philadelphia, 1860.

MR. HILLIARD is an author not unknown in England. He has here executed an elaborate work, and it is due to him not to attempt to pronounce upon it dogmatically without at least having first discussed it critically. It must, however, like other men and books, bide its time.

The General and Commercial Law, as recognised in the Jurisprudence of the United States. By William O. Bateman. Counselor-at-Law. T. & J. W. Johnson and Co., Philadelphia, 1860.

We shall probably take up this volume for the purpose of more minute study and comment. The subject, of course, is of the first importance; and, as we are inclined to believe, judging from the investigation which we have already been able to extend to the book itself, it merits consideration at the hands of the jurist.

Events of the Quarter.

THE EVENTS PARLIAMENTARY are, so far as we are directly concerned, not very extensive. The Bankruptcy Bill while we write is "under consideration." It has been a good deal worried on the horns of the two Legislative Houses. We will say of it now, as a gentleman at a festive party at Greenwich lately remarked of a fish-bone in his throat at an early age of the entertainment; "It really can't stop where it is now, nor under any circumstances will it satisfy the cravings of nature."

The statutes of the session will in due course receive our notice. A good deal of popular rubbish has been carted about of late with regard to the great talk and small action of Parliament. Having respect to much which the Statute Book contains, we affirm boldly that the House is as a general rule much more innocuously occupied in talking than in passing Bills. Ministerial explanations, official declarations and returns, present a multitude of suspicious newspaper mystifications, and foolish talking and jesting, which are not convenient. The recess will bring to the newspaper press, "Correspondence," "Our own Correspondence," "Our special Correspondence," &c., which, to say the least, may occasionally be allowed to give place to columns of parliamentary proceedings. People may grumble at M.P.s talking excessively; but they would revolt if they were silent, nor would leading articles then satisfy their want.

LAW AMENDMENT SOCIETY.—The seventeenth anniversary festival of the Law Amendment Society, which was celebrated at Greenwich on the 13th July, was more than usually interesting. Lord Brougham, at the conclusion of an admirable speech on the different measures of law amendment which had been introduced into Parliament during the session, adverted to the defective state of the criminal law in continental countries, and to the improvements which had been effected in France of late years. He then spoke of his friend M. Berryer, as one of the first lights of the law in that country; a man of great diligence and extraordinary eloquence, whose powers as an advocate, and whose unsullied honesty and integrity to his clients, at all hazards to himself, were such that he could only be compared to our own illustrious Erskine. Lord Brougham stated that M. Berryer had yielded to his, Lord B.'s urgent request that he would publish some of his celebrated speeches. He mentioned also that he had some hopes that M. Berryer would attend the Social Science Congress at Dublin, in August, and was quite certain that he would be in London for a week at the beginning

of Michaelmas Term, when the whole Bar would hold a banquet in Lincoln's Inn Hall for his reception. A capital photograph of M. Berryer was shown in the tea room.

The Attorney-General proposed the health of Lord Brougham in a speech at once graceful in expression and admirable in sentiment. After adverting to the great services of his Lordship as a law-reformer, and to the pleasure and satisfaction which his Lordship enjoyed of having lived to witness largely the fruits of his own labours, he said, that "having ventured so far to speak of the labours and merits of this noble lord, he should be guilty of committing an injustice if he did not say that their noble and learned friend had not only been a great lawyer among great lawyers, but also a philosopher among philosophers, and a chief among men of letters; and above all, the towering and consummate orator of the age. To these things at least a word of reference should be made—to his high deserts, to the acknowledgement they had received at the hands of his countrymen, and to the success with which his efforts had been attended."

Sir Fitzroy Kelly, after referring to Lord Brougham's great speech on law reform in 1828, and to the fruits which it had borne, stated that he (Sir F. Kelly) would never consider his own task wholly done until he should have seen several reforms effected in the criminal law. The first of these was the question of a criminal appeal. Another was, the allowing defendants in criminal cases to be examined on oath if they chose, though of course not compulsorily.

THE BAR.—Mr. Edwin James, one of Her Majesty's counsel, has been disbarred; he has appealed to the judges, his solicitor says. If the Benchers had always done their duty in cutting off unworthy members from the profession, the profession would stand higher than it does; now the Benchers are supposed to be impotent folk as protectors of our honour. Irregularities have flourished, and notorious men have been tolerated. We are glad to hear that other cases are before the Benchers, and we trust that again they will be found to do their duty. We do not want an inquisition to be established; but we ask the Benchers this question: "Ought a man with whom no gentleman can associate because his conduct is scandalous, dishonourable, cowardly, and blackguardly—known to be such, so proved—ought a man who flagrantly has violated the public rights of society to be permitted to practice at the Bar, and be forced upon the company of counsel?" Both the Bar and the Rolls of Attorneys require more careful weeding.

G. HARRY PALMER, Esq., M.A., Barrister-at-Law, has received the appointment of Secretary to the Society for Promoting the Amendment of the Law.

APPOINTMENTS, &c.

UPON the death of Lord Chancellor Campbell, Sir Richard Bethell, Q.C., Her Majesty's Attorney-General, was raised to the Woolsack ; Sir William Atherton, Q.C., S.G., was promoted to the Attorney-Generalship, and Mr. Roundell Palmer, Q.C., was appointed Solicitor-General.

The Lord Chancellor was raised to the Peerage by the title of Baron Westbury of Westbury.

Francis Ellis, Esq., of the Home Circuit has been appointed to the County Court Judgeship (Circuit No. 34) which became vacant from the resignation of Mr. Edward Cooke.

Charles Frere, Esq., of the Middle Temple, Barrister-at-Law, Examiner for Standing Orders to the two Houses of Parliament, has been appointed to the Office of Taxing Master to the House of Commons.

Mr. Henry Wyndham West, of the Northern Circuit and the West Riding and Leeds Borough Sessions, Recorder of Scarborough, Revising Barrister for the West Riding and Junior Counsel to the Admiralty, has been appointed to the Attorney-Generalship of Lancaster, in the room of the late Mr. T. F. Ellis. Mr. West was called in the year 1848.

J. R. Bulwer, Esq., of the Norfolk Circuit, has been appointed to be Recorder of Ipswich in the room of David Power, Esq., Q.C., resigned.

Mr. Charles Pollock has succeeded Mr. Ogle as "Tubman" in the Court of Exchequer.

IRELAND. The Crown-Solicitorship of Cork, Limerick, and Kerry with Clare, which became vacant upon the death of Sir Matthew Barrington, have been respectively conferred on Mr. Gilman, Mr. William Roche, and Mr. S. Morphy. The salary of each Solicitor is £900 per annum.

CEYLON.—Henry Dias, Esq., of the Middle Temple, Barrister-at-Law, has been appointed by the Queen to be a Member of the Legislative Council of this Island.

CAFFRARIA.—James Coleman Fitzpatrick, Esq., of the Home Circuit, has been appointed to be Judge of British Caffraria.

ISLAND OF DOMINICA.—The Chief Justiceship of this Island has been conferred on Sholto Pemberton, Esq.

BERMUDAS.—Samuel Brownlow Gray, Esq., of Lincoln's Inn, Barrister-at-Law, has been appointed to be Attorney-General for the Bermudas or Somer's Islands.

CALLS TO THE BAR.

Easter Term, 1861.

INNER TEMPLE.—Henry Pottinger, Esq., B.A.; John Hardy, Jun., Esq.; Philippe Gaston Martin Moucamp, Esq.; Charles Boyle, Esq.;

James Jephson, Esq.; William Potter, Jun, Esq., B.A.; and William Roupell, Esq., M.P.

LINCOLN'S INN.—William Windsor Parker, Esq., M.A., Oxford; William Fraser Rae, Esq.; William Henry Deverell, Esq., B.A., Cambridge; Walter John Bacon, Esq., B.A., Oxford; William Henry Baillie, Esq., B.A., Cambridge; George Rogers Harding, Jun., Esq., and Henry Diedrick Jenker, Esq.

Trinity Term, 1861.

INNER TEMPLE.—William Willis, Esq., B.A. (holder of the studentship awarded in Michaelmas Term, 1860); Joseph Green, Esq., B.A. (certificate of honour); Emanuel Maguire Underdown, Esq., (certificate of Honour); Montague Woodmass, Esq., B.A.; St. Aubyn Barret Leonard, Esq., M.A.; Reginald Carew Glanville, Esq., B.A.; Andrew Thomson, Esq., B.A., LL.D; John Simson, Esq.; Thomas Child Hayllar, Esq., S.C.L.; Markham John Law, Esq., B.A.; Daniel Birt, Esq.; George Thomas Edwards, Esq., B.A.; Arthur Yardley, Esq., and Stuart Rendal, Esq., M.A.

MIDDLE TEMPLE.—John Houston, Esq., (holder of the certificate of honour first class for the council of legal education); James Johnson, Esq.; Anthony Blake Rathbone, Esq., Robert Armstrong, Esq.; Henry Finch, Esq.; George Ratray Fenton, Esq., and Wm. Draper Bolton, Esq.

LINCOLN'S INN.—Gerald FitzGibbon, Jun., Esq.; George Holford, Esq., M.A.; Daniel Jones, Esq., M.A.; Thomas Watson, Esq., B.A.; Charles Nicholas Warton, Esq.; Robert Dalby, Esq., B.A.; Charles Henry Blake, Esq., B.A.; George Hanbury Field, Esq., M.A.; Augustin William Langdon, Esq., B.A.; John Lindsay Johnstone, Esq., M.A.; William Henry Burch Rosher, Esq., Thomas Daniel Tremlett, Esq., M.A.; Anthony Wood Freeland, Esq., B.A.; Richard Welford John Irving Courtney, Esq., M.A.; Christopher John Cottingham, Esq.; J. Bamfield Street, Esq., B.A., and Reed Parker, Esq., B.A.

GRAY'S INN.—Lawrence Counsel, Esq.; George Harry Palmer, Esq., M.A.; Samuel Kydd Esq.; William Brook Bridges Stevens, Esq.; and William Henry Clarke, Esq., LL.D.

BAR EXAMINATION.

At a public examination of the students of the Inns of Courts, held at Lincoln's-Inn Hall, on the 15th, 16th and 17th days of May, 1861, the council of legal education awarded to Hugh H. O. R. Macdermott, Esq., a studentship of fifty guineas per annum, to continue for a period of three years; to Emanuel Maguire Underdown, Esq., John Houston, Esq., and Charles Charlton Massey, Esq., certificates of honour of the first class; to Charles Owen, Esq., John Bamfield Street, Esq., James Watson, Esq., Joseph Inglesant, Esq., Reginald Carew

Glanville, Esq., Robert Dalby Dalby, Esq., John Alfred Hudson, Esq., the Hon. Evelyn Melbourne Ashley, Christ. John Cottingham, Esq., and Charles Bertie Pulleine Bosanquet, Esq., certificates that they have satisfactorily passed a public examination.

EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

Easter Term, 1861.

At the examination held this Term of Candidates for admission on the roll of attorneys and solicitors of the superior courts, the examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—

Jacob John Moser, aged 22; John William Bacon Grey, aged 22; Thomas Goodman, aged 21; John William North, aged 24; and Frederick Messiter, aged 22.

The Council of the Incorporated Law Society accordingly awarded the following prizes of books:—

To Mr. Moser, the prize of the Honourable Society of Clifford's Inn, and as a further mark of distinction, one of the prizes of the Incorporated Law Society; to Mr. Grey, the prize of the Honourable Society of Clement's Inn; to Mr. Goodman, one of the prizes of the Incorporated Law Society; to Mr. North, one of the prizes of the Incorporated Law Society; to Mr. Messiter, one of the prizes of the Incorporated Law Society.

The examiners also certified that the following candidates, whose names are placed in alphabetical order, passed examinations which entitled them to commendation:—

Thomas Brevit, aged 21; Richard Betton Charles Pulsford Foster, aged 24; William Henry Moberly the younger, aged 21; John Price, aged 23; William Tilly, aged 21; and John Wintringham, aged 21.

The council accordingly awarded them certificates of merit.

The examiners further announced to the following candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them to prizes or certificates of merit, if they had been under the age of 26:—

Henry William Bleby, B.A., aged 29; William Alexander Crump, aged 34; John Hammett Knott, aged 37; and Sydney Mayhew, aged 27.

The number of candidates examined in this term was 101; of these, 90 were passed and 11 postponed.

Trinity Term, 1861.

At the examination held this term, the examiners recommended the following gentlemen under the age of 26 as being entitled to honorary distinction: Germain Lavie M.A., aged 25; Charles Albert Bannister, aged 21; William Henry Churton, aged 21; William

Crump Thomas, aged 21 ; Charles Buckley, aged 22 ; and Abel Tillett, aged 22.

The council of the Incorporated Law Society accordingly awarded the following prizes of books :—

To Mr. Lavie, the Prize of the Honourable Society of Clifford's Inn; to Mr. Bannister, the Prize of the Honourable Society of Clement's Inn; To Mr. Churton, one of the Prizes of the Incorporated Law Society; to Mr. Thomas, one of the Prizes of the Incorporated Law Society; to Mr. Buckley, one of the Prizes of the Incorporated Law Society; to Mr. Tillett, one of the Prizes of the Incorporated Law Society.

The examiners also certified that the following candidates, whose names are placed in alphabetical order, passed examinations which entitled them to commendation :—

Henry Botterill, aged 21 ; George John Cuddon, aged 24 ; Benjamin Green Lake, aged 22 ; Henry Fricker Lawes the younger, aged 22 ; Charles Frederick Lowe, aged 22 ; Frederick Heygate Nunneley, aged 24 ; Frederick Danby Palmer, aged 21 ; Frederick William Pamphilon, aged 21.

The Council accordingly awarded them Certificates of Merit.

The Examiners further announced to the following candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them to Prizes or Certificates of Merit if they had been under the age of 26 :—

George Brown, aged 32 ; Sutton John Elliott, aged 26 ; John Bridges Nunn, aged 26 ; William Conning Shepherd, aged 28 ; and William Theodore Pitt Watkins, aged 28.

The number of candidates examined in this Term was 125 ; of these, 120 were passed, and 5 postponed.

Necrology.

April.

- 17th. JONES, ISAAC, Esq., Solicitor.
- 18th. KEENE, GEORGE J., Esq., Solicitor.
- 20th. SANDERSON, EDWARD D., Esq., Chief Justice of the Island of Tobago, aged 52.
- 23rd. HILLIER, W. J., Esq., Solicitor.
- 26th. CANNOCK, JOSEPH, Esq., Solicitor, aged 52.
- 26th. GREENFIELD, THOMAS, Esq., Solicitor, aged 68.
- 28th. DAY, FREDRICK, Esq., Solicitor, aged 48.
- 28th. HOWARD, THOMAS, Esq., Solicitor.

May.

- 1st. JACKSON, ROBERT, Esq., Solicitor, aged 68.
- 2nd. DAVIES, THOMAS, Esq., Solicitor, aged 67.
- 6th. LEEMING, HENRY, Esq., Barrister, aged 39.
- 9th. HUNTER, JOSEPH, Esq., F.S.A., one of the Assistant-Keepers of Her Majesty's Records, aged 79.
- 10th. PHIPPARD, WILLIAM, Esq., Solicitor, aged 36.
- 11th. PACKWOOD, JOHN B., Esq., Solicitor, aged 66.
- 14th. GALE, WILLIAM G., Esq., Solicitor, aged 27.
- 25th. COPEMAN, HENRY, Esq., Solicitor, aged 57.
- 29th. BURBEY, RICHARD, Esq., Solicitor, aged 53.

June.

- 7th. PHILLIPS, ALDCROFT, Esq., Solicitor, aged 72.
- 8th. TAUNTON, JOHN, Esq., Solicitor, aged 51.
- 16th. CRAFTER, GEORGE, Esq., Solicitor, aged 31.
- 19th. PLUNKETT, H., Esq., Solicitor, aged 48.
- 23rd. JOHN, LORD CAMPBELL, Lord High Chancellor of England, aged 80.
- 25th. RUTTLE, DANIEL, Esq., Solicitor.
- 29th. SLANEY, THOMAS, Esq., Solicitor, aged 51.

July.

- 1st. HANCOCK, CHARLES, Esq., Solicitor, aged 44.
- 3rd. KING, ALFRED, Esq., Solicitor, aged 61.
- 6th. PALGRAVE, FRANCIS, Sir K. H. Deputy-Keeper of the Public Records, aged 73.
- 12th. KETTERER, OSWALD W., Esq., of the Supreme Court of Judicature Bombay, aged 56.
- 12th. MORE, JOHN S., Advocate, LL.D.

List of New Publications.

Ayckbourn—The Practice of the High Court of Chancery, as altered by recent Statutes, and by the Consolidated and other General Orders of the Court; with Practical Directions and a copious Selection of Modern Cases. Seventh Edition. By H. Ayckbourn, Solicitor. Part I. royal 12mo., 10s. cloth.

Bilton—The Law and Practice of the Sheriffs' Court of the City of London, with a Schedule of Fees, &c. By A. F. Bilton, Esq., Barrister. Post 8vo., 2s. 6d. cloth.

Brickdale—The Leases and Sales of Settled Estates Act, (19 & 20 Vict. cap. 120,) and the General Orders and Regulations Relating thereto, with an Introduction, and Notes and a Supplement, containing the Amending Act, (21 & 22 Vict. cap. 77,) and the

Cases and Decisions down to the end of Easter Term, 1861. By M. J. F. Brickdale, Esq., Barrister. 12mo., 5s. boards.

Ebsworth—A Handy Book on the Law of Infants. By J. Ebsworth, Solicitor. 12mo., 3s. cloth.

Fowler—Collieries and Colliers: a Handbook of the Law and Leading Cases relating thereto. By J. C. Fowler, Esq., Barrister. 12mo., 6s. cloth.

Grant—500 Questions on Francillon's Law Lectures. By C. W. Grant, Solicitor. 8vo., 1s. cloth.

Housman—A Selection of Precedents in Conveyancing, designed as a Handbook of Forms in frequent use, with Practical Notes. By F. Housman, Esq., Barrister. 8vo., 15s. cloth.

Jarman—A Treatise on Wills. Third Edition. By E. P. Wolstenholme and S. Vincent, Esqs., Barristers. 2 vols. royal 8vo., £3 3s. cloth.

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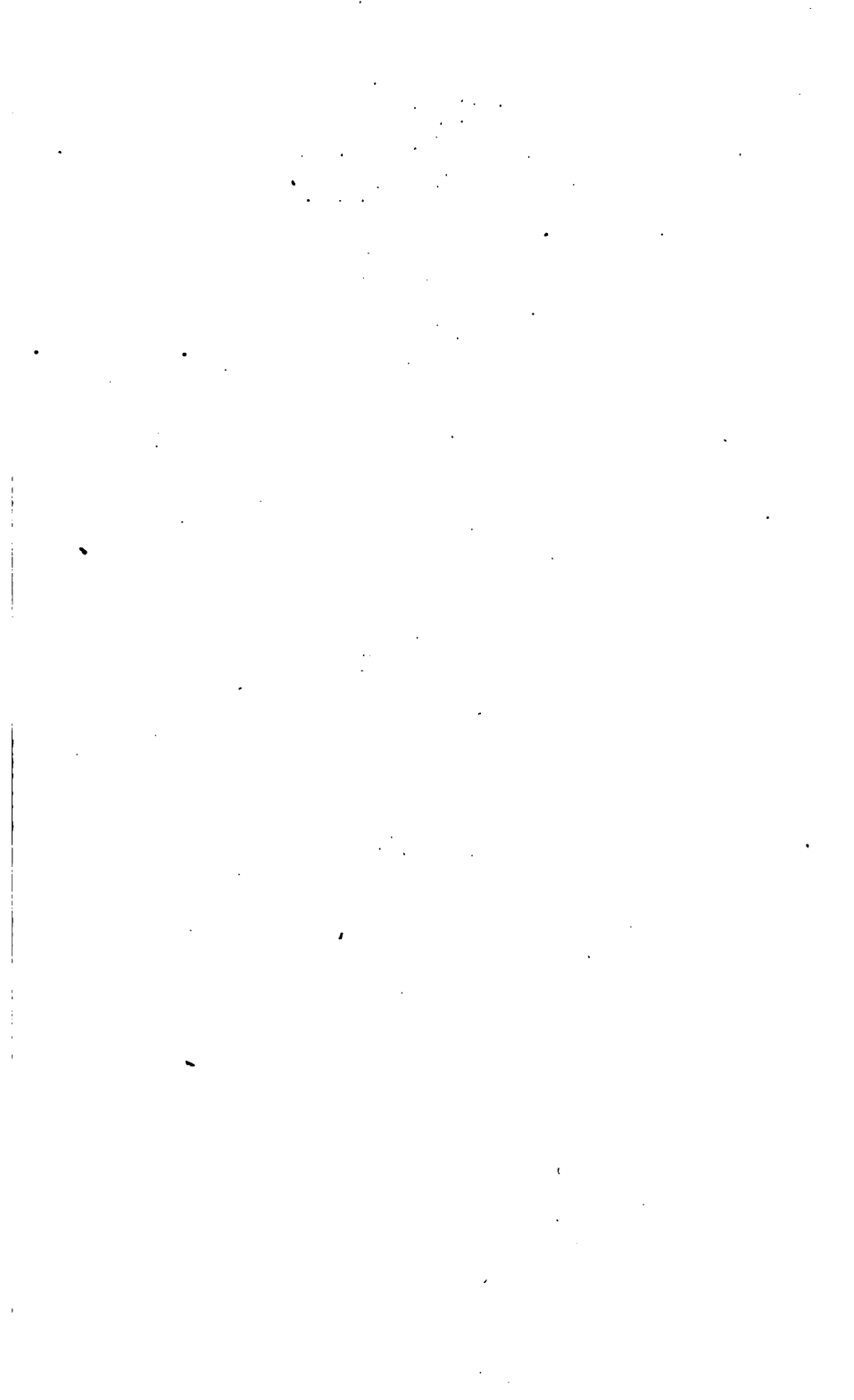
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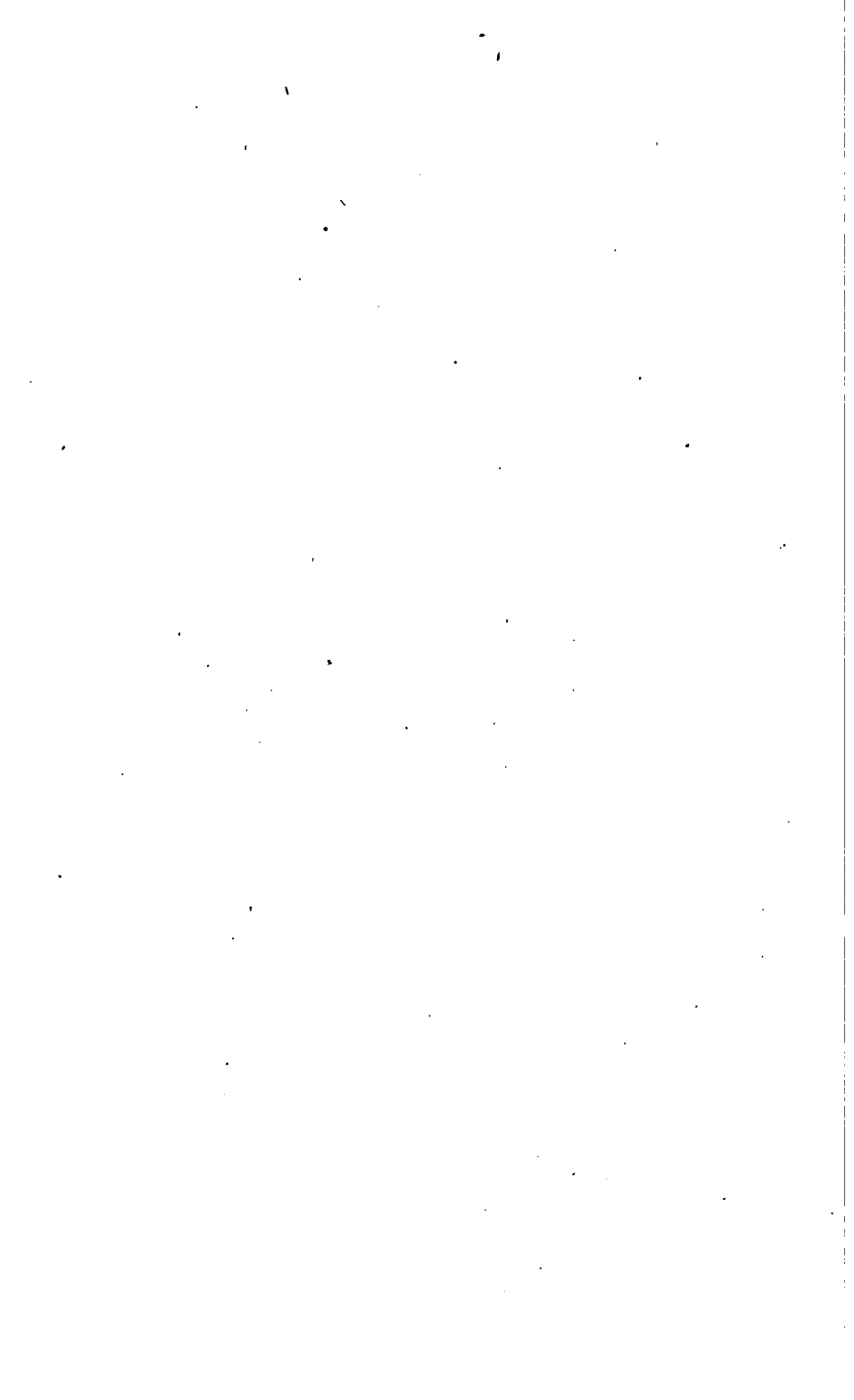
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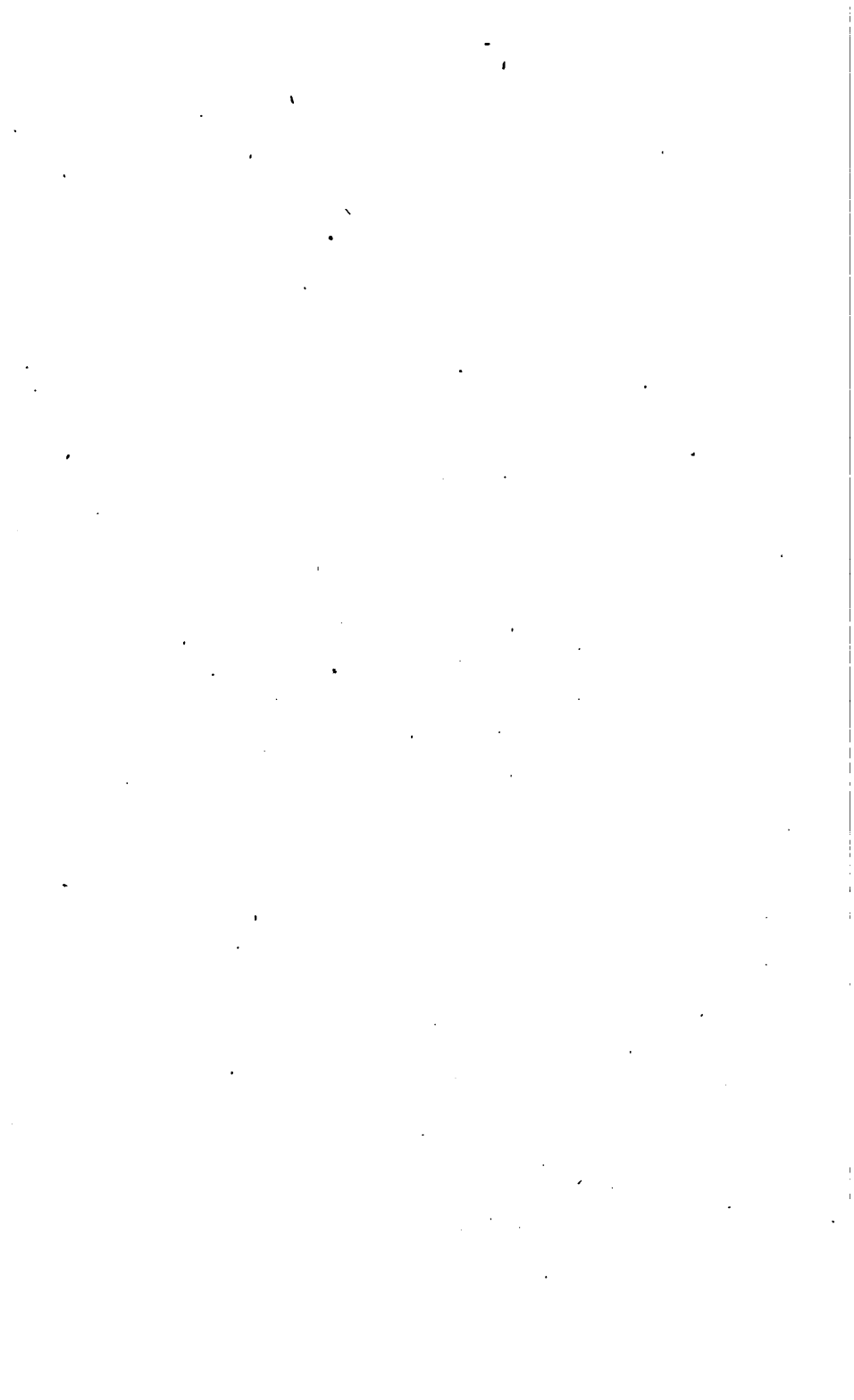
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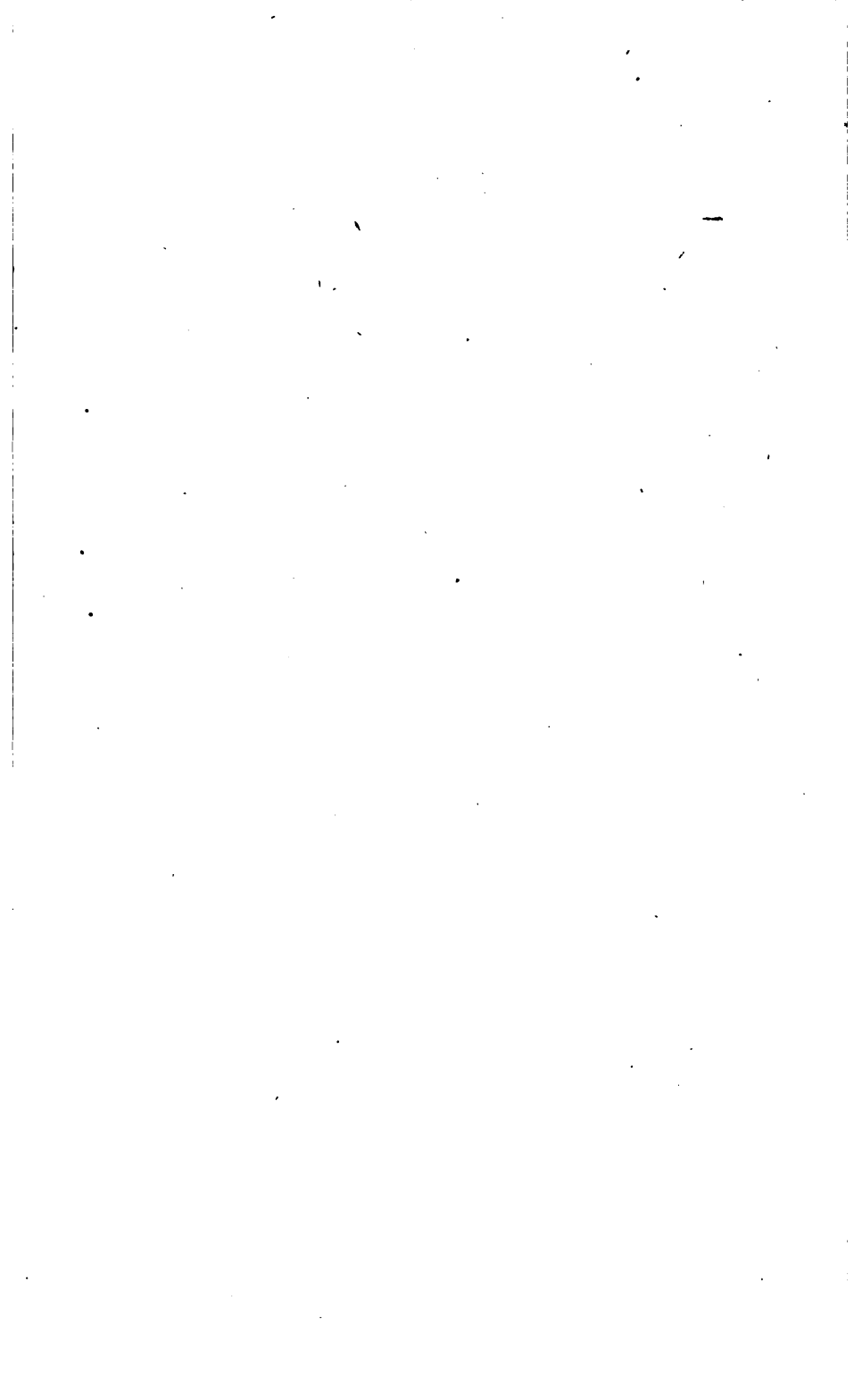
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